(5) (4) (4)

Nos. 87-2050, 88-90, 88-96

Supreme Court, U.S.
FILED
NOV 17 1988
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CLERK

In the
Supreme Court of the United States

October Term, 1988

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania, *Petitioners,*

and

CHABAD, *Petitioner,*

vs.

AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR, *Respondents,*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Joint Appendix

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Petition for Certiorari Filed—
Petitioner, County of Allegheny, June 14, 1988
Petitioner, City of Pittsburgh, July 16, 1988
Petitioner, Chabad, July 15, 1988
Certiorari Granted October 3, 1988

328 (1)

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The following Opinions and Orders have been omitted from this Joint Appendix because they appear in all Petitions for Certiorari filed herein. For convenience of reference, they appear on the following pages of the Petition for Writ of Certiorari filed by the County of Allegheny herein:

Memorandum Opinion and Order of the United States District Court for the Western District of Pennsylvania ..... Pet. App. A, 1a

*A list of corrections to the Transcripts appears at of this Appendix.

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Exhibits are contained in a separate volume pursuant to Rule 30.6

The United States Court of Appeals

FOR THE THIRD CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,

Appellants

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,

Appellees

and

CHABAD,

Intervenor

DOCKET NOS. 87-3395 and 87-3436

Date	Relevant Filings
1987	
Sept. 22	Motion by Appellant to consolidate appeals 87-3395 and 87-3436.
Sept. 24	Order granting above motion. Appeals 87-3395 and 87-3436 are consolidated for purposes of briefing and disposition.

Date	Relevant Filings
1988	
Mar. 28	Petition for Rehearing before the Court In Banc by City of Pittsburgh. (cvs. 87-3395 and 87-3436)
Mar. 28	Petition for Rehearing before the Court In Banc by Chabad. (cvs. 87-3395 and 3436).
Apr. 19	Order (Gibbons, Chief Judge, Seitz, Higginbotham, Sloviter, Becker Stapleton, Mansmann *Greenberg*, Hutchinson Scirica Cowen and Weis, Cir. Judges), denying the petitions for rehearing by appellees, County of Allegheny, City of Pittsburgh and Chabad. When the cases were decided J. Weis was an active judge but he is now assumed senior status and has participated in the decision on the petitions as a Senior Judge. J. Higginbotham, Stapleton, Mansmann Hutchinson & Scirica would grant rehearing by the Court In Banc. J. Weis would grant panel rehearing.
May 18	Order (Gibbons, Chief Judge, *Greenberg* and Weis, *Cir. Judges*) denying motion (by County of Allegheny) to stay of mandate pending pet. for writ of cer.
May 18	Order (Gibbons, Chief Judge, *Greenberg* and Weis, *Cir. Judges*) denying motion (by City of Pittsburgh) to stay of mandate pending pet. for writ of cert.

The United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELPING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,

Plaintiffs

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,

Defendants

and

CHABAD,

Intervenor

CIVIL ACTION NO. 86-2617

Date	N.R.	Proceedings
1986		
Dec. 10	1	Complaint filed.
Dec. 10	2	Application for TRO with proposed order filed.
Dec. 10	3	Motion for preliminary injunction filed with proposed order.
Dec. 12	4	Order entered directing that a hearing on a motion for a preliminary injunction will be held on 12-15-86.

Date	N.R.	Proceedings
Dec. 15	5	Amended complaint by plfs.
Dec. 16	7	Hearing, McCune, J. 12-15. Memo filed.
Dec. 29	10	Answer to Amended Complaint filed by defendant, County of Allegheny.
Dec. 30	11	Motion to Dismiss filed by defendant City of Pittsburgh.
1987		
Jan. 16	14	Motion of Chabad to Intervene & to Adduce Limited Evidence filed with proposed order.
Jan. 22	16	Motion to Dismiss filed by Chabad.
Jan. 30	17	Stipulation re: Nativity scene filed by counsel.
Jan. 30	18	Stipulation re: Menorah filed by counsel.
Jan. 30	19	Stipulation re: record being considered complete & serving as the record for purpose of courts ruling on plaintiffs request for preliminary injunction filed.
Feb. 18	22	Answer of City of Pittsburgh to Chabad's Motion in Opposition to Stipulation filed.
Feb. 19	25	Response of plaintiffs represented by the American Civil Liberties Union in opposition to the Motion to Intervene and adduce limited testimony by Chabad filed.
Mar. 17	26	Order 3-16 that Motion of Chabad to Intervene and to adduce limited evidence is granted.

Date	N.R.	Proceedings
Apr. 27	28	Hearing on Chabad's Making of a record began and concluded on 4/27/87; memo filed.
May 8	30	Memorandum opinion filed & order entered directing that motion of the city to dismiss is denied. However the motions for a permanent injunction and for declaratory relief are denied.
May 29	29	Pursuant to order entered, judgment is hereby entered for defendant and against plaintiff.
June 1	32	Notice of Appeal from final judgment order dated 5/29/87 filed by plaintiffs.
June 22	34	Notice of appeal from order of 5/8/87 & 5/29/87 filed by plaintiff Malik Tunador.

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 87-3395 & 87-3436

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,

CHABAD,

Intervenor

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE,

Appellants No. 87-3395

MALIK TUNADOR,

Appellant No. 87-3436

On Appeal from the United States District Court for the Western District of Pennsylvania D.C. Civil No. 86-2617

Present: GIBBONS, *Chief Judge,* WEIS and GREENBERG, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel January 20, 1988.

Nos. 87-3395 & 87-3436

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered May 8, 1987 and May 29, 1987, be, and the same are hereby reversed and the cause remanded to the said District Court for further proceedings consistent with the opinion of this Court. Costs taxed against the appellees.

ATTEST:

/s/ SALLY MRVOS

Clerk

[180]

THE COURT: Let the record show that it's about 5:25, the court room has been occupied by a number of people all day who apparently are awaiting the decision on this Motion for a Preliminary Injunction which seeks to enjoin both the County and City.

[181]

Let the record show that, therefore, we'll briefly state some short findings of fact and make a decision here.

The Motion for a Preliminary Injunction against the City and against the County will be denied.

This case presents a Motion for a Preliminary Injunction under the Establishment Clause, the First Amendment as applied to the States through the Fourteenth Amendment. In my view, the case of Lynch vs. Donnelly is the last teaching that I can find in this field, and I think this case is governed by it, although the facts are not the same. The facts, of course, are never precisely the same in any of the Establishment Clause cases.

Let the record show that in this case the City proposes to erect a menorah in front of the City Building on approximately December the 27th, and there is already erected and has been erected since November 26th on the main staircase of the County Courthouse a display which contains a nativity scene, sometimes spoken of as a creche. The display is shown in Exhibits D and F and various of the exhibits made part of the record.

The creche scene is a traditional one, not particularly large, not particularly small. It's surrounded by red and white Poinsettas and surrounded by a fence and sits upon the stairwell. It's part of a holiday celebration that the County Commissioners apparently foster and encourage, where every day during the Christmas season choirs come to this part of the [182] Courthouse and assemble and sing

music of various kinds, including some carols and some hymns, and some religious music, some secular music. The program is well received. The Christmas decorations, of course, are part of the program.

There are some evergreen trees in other parts of the Courthouse. This particular place in the Courthouse is a beautiful, impressive place with murals on the walls which are lighted. Some of them show fallen warriors and angels and scenes of various kinds. One of the pictures shows the choir of one of the high schools involved standing behind the creche, and generally the creche merely contributes as part of the overall Christmas scene.

The menorah we have no pictures of. We understand what a menorah is and have seen one before and have seen them in Christmas displays. The City proposes to place the menorah on the steps of the City Building.

We find that the display of either the nativity scene or the menorah fails to convey a message of governmental enforcement of either religion. We find that the mere display presents no appreciable risk of establishing either religion.

To put it another way, the displays here both of the nativity scene presently in place and the proposed placing of the menorah are de minimis in the context of the application of the Establishment Clause. It is noted that none of the people who enter the Courthouse are required to do anything; [183] they are not required to read, or to sing, or to pause or to reflect. Neither are people required to pause or look or read or make any gestures where the menorah is concerned; they are merely displays.

They are said to be offensive. We think the people who have testified are sincere people and truthful, and they say that they find these displays offensive, but the Governments of the United States, Local and State and Federal do

many things that are offensive to many people, and I find that mere offense is not sufficient to impel the Court to issue an injunction. There must be more substantial injury than mere offense that is felt inwardly. But it is not felt because one must read, or sing, or talk or pause, or do something affirmatively.

The mere displays, therefore, are found to be de minimis in the context of the First Amendment. I don't think there's any danger whatever that they will establish any religion. I don't think the County Commissioners or the Mayor and the City intend to affect anyone's religion, or even offend anyone. On the contrary, I think the intention was to celebrate the holiday season, and I doubt that the County or City officials paused to think that they were offending anyone. So, therefore, I just do not see very much chance of the plaintiffs succeeding on the merits. I don't think that there has really been any appreciable harm. I don't think that the mere reference [184] to religion is actionable.

Those findings, as brief and as incomplete as they are, are sufficient for this purpose, and we'll recess for the night.

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, et al.,
Plaintiff

vs.

COUNTY OF ALLEGHENY and THE CITY OF PITTSBURGH,
Defendants

Civil Action No. 86-2617

ORDER

AND NOW, May 29, 1987 in accordance with the Memorandum Opinion and Order of May 8, 1987 Judgment is hereby entered in favor of the Defendants and against the Plaintiff.

/s/ BARRON P. MCCUNE

Barron P. McCune
Senior United States
District Judge

cc: James B. Lieber, Esq.
Roslyn M. Litman, Esq.
Jon Pushinsky, Esq.
Benjamin Wechsler, II, Esq.
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Charles H. Saul, Esq.

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,
Plaintiffs

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,
Defendants

Civil Action No. 86-2617

AMENDED COMPLAINT

Plaintiffs bring this action against Allegheny County and the City of Pittsburgh to enjoin those governmental entities from violating the Establishment Clause of the First Amendment to the United States Constitution and 42 U.S.C. §1983 by storing, maintaining, erecting and/or displaying religious symbols inside the Allegheny County Courthouse and in front of the main entrance to the City-County Building. These two buildings serve as the seats of government for both County and City governments and house the Allegheny County Courts of Common Pleas.

I. JURISDICTION

1. Jurisdiction to hear Plaintiffs' claims is conferred upon this court by 28 U.S.C. §1343 (3) concerning the

original jurisdiction of the district courts to award appropriate relief for the violation, under color of state law, of any constitutional right or federal statute providing for the protection of civil rights.

II. PARTIES

2. Plaintiff American Civil Liberties Union, Greater Pittsburgh Chapter (hereinafter "ACLU"), is a voluntary non-profit organization dedicated to preserving and protecting the civil rights and civil liberties secured by the United States Constitution. The majority of ACLU's members are tax paying residents of the City of Pittsburgh and County of Allegheny. ACLU brings this action, on behalf of its members, due to concerns that the use of religious symbols herein described have the effect of the government's promoting certain religions over others, of establishing those religions as officially sanctioned religions, of diminishing and trivializing the religious significance of the symbols and undermining the Constitution's principle of separation of church and state. Many ACLU members are lawyers whose profession requires them to attend proceedings in the Allegheny County Courthouse and in the City-County Building during the time the religious symbols are on display. Additionally, ACLU has numerous clients who are parties to cases which are routinely litigated in the Courthouse and in the City-County Building.

3. Plaintiff Ellen Doyle is a property owner and taxpaying resident of Defendants County of Allegheny and City of Pittsburgh. She serves as ACLU's chairperson and is a lawyer who has occasion to practice in the Allegheny County Courts.

4. Plaintiff Michael Antol is a taxpaying resident of Allegheny County. He is a lawyer with the Neighborhood Legal Services Association who regularly appears before

the Allegheny County Courts located in the Courthouse and in the City-County Building.

5. Plaintiff Reverend Wendy L. Colby is a registered voter and taxpaying resident of Defendant County of Allegheny. She is the minister of the Unitarian Universalist Church of the North Hills.

6. Plaintiff Howard Elbling is a property owner and taxpaying resident of Defendants County of Allegheny and City of Pittsburgh. He is a lawyer who is employed as a law clerk by one of the Judges of the Allegheny County Court of Common Pleas whose courtroom is located in the Allegheny County Courthouse. As a law clerk, Mr. Elbling is regularly required to be present in the Courthouse.

7. Plaintiff Hilary Spatz Levine is a property owner and taxpaying resident of Defendants County of Allegheny and City of Pittsburgh. She is an attorney who engages in the private practice of law who regularly appears before the Allegheny County Courts located in the Allegheny County Courthouse and the City-County Building.

8. Plaintiff Max A. Levine is a property owner and taxpaying resident of Defendants County of Allegheny and City of Pittsburgh. He is an attorney who engages in the private practice of law who regularly appears before the Allegheny County Courts located in the Allegheny County Courthouse and the City-County Building.

9. Malik Tunador is a property owner and taxpaying resident of the Allegheny County. Having been born and raised in Turkey, Mr. Tunador has been a naturalized United States citizen for approximately twenty years. He is a member of the Muslim faith.

10. Defendant County of Allegheny is a political subdivision of the Commonwealth of Pennsylvania. It owns the Allegheny County Courthouse.

11. Defendant City of Pittsburgh is a political subdivision of the Commonwealth of Pennsylvania. It, together with Allegheny County, owns the City-County Building.

III. FACTS

12. On or about November 26, 1986, a creche (commonly referred to as a nativity scene) was erected inside the main entrance of the Allegheny County Courthouse.

13. The creche is prominently displayed on the steps and first floor landing of the Courthouse. It is visible to untold numbers of Allegheny County residents coming to the Courthouse to conduct official business.

14. The creche's appearance in the Courthouse constitutes a religious depiction of the birth of Jesus Christ. Several human figures are portrayed on their knees with hands clasped as if in prayer. On top of the manger is a winged angel with a banner bearing the Latin inscription "GLORIA IN EXCELSIS DEO" (Glory to God in the highest). The quotation is from the Gospel of Luke, 2:14.

15. A sign informs the viewer that the display has been "Donated By The Holy Name Society".

16. On information and belief, it is averred that:

a. the display is erected by County employees at County expense;

b. the display is stored on County property when not erected; and

c. the display is guarded and maintained by County employees who receive County salaries.

17. A substantially identical display has appeared in the Courthouse in recent years. Each year, shortly after Christmas, the creche is dismantled by County employees and placed back in storage on County property.

18. Prior to the erection of the 1986 creche, Plaintiff ACLU wrote to the County Commissioners requesting that Defendant Allegheny County refrain from placing religious symbols inside the Courthouse. Defendant Allegheny County denied Plaintiff ACLU's written request.

19. The County Courthouse represents the seat of government for Defendant County of Allegheny in the following particulars among others:

a. The County Commissioners, the County's principal governing body, meet and maintain offices in the Courthouse.

b. A majority of Allegheny County Court of Common Pleas Criminal Division trials are conducted in the Courthouse.

c. Civil cases involving amounts not in excess of $20,000 are initially heard in the Courthouse.

d. The Allegheny County Clerk of Courts is located in the Courthouse.

e. The Allegheny County Controller maintains his office there.

f. Treasurer/Sheriff as well as numerous official offices, are located in the Courthouse.

20. In previous years, a large menorah has been constructed next to Defendant City of Pittsburgh's Christmas tree which is displayed on the steps of the main entrance to the City-County Building.

21. The menorah, a religious symbol in the form of a candelabra, is used by members of the Jewish religion as part of the Celebration of Chanukah.

22. The City County Building is owned and operated jointly by defendants Allegheny County and City of Pittsburgh.

23. On information and belief, it is averred that:

a. the display is erected by City employees at City expense.

b. the display is stored on City property when not erected; and

c. the display is guarded and maintained by City employees who receive City salaries.

24. By letter dated November 13, 1986 (attached as "Exhibit A") Plaintiff Ellen Doyle wrote to City of Pittsburgh Mayor Richard Caliguiri requesting that the City refrain from permitting religious displays at the building housing the seat of City government. By letter dated November 18, 1986 (attached as "Exhibit B"), Mayor Caliguiri stated his intention to repeat the same display this year.

25. Mayor Caliguiri's letter gives rise to the reasonable expectation that the menorah will be placed at the City-County Building within the next few weeks.

26. The City-County Building, like the Courthouse, houses numerous governmental and official offices. The following can be found at the City-County Building:

a. The Mayor's Office

b. City-Council Chambers

c. Allegheny County Prothonotary

d. Marriage License Bureau

e. City Treasurer

f. Pittsburgh Commission on Human Relations

g. Allegheny County Bar Association

h. Allegheny County Law Library

i. Allegheny County Court of Common Pleas, Civil, Orphans and Family Divisions

j. Register of Wills

k. Pennsylvania Supreme Court Prothonotary

l. City of Pittsburgh Parks and Recreation

27. At all times and in all conduct relevant to the matters alleged in this Complaint, Defendants have pursued local governmental practices, policies and customs and have done so under color of state law.

IV. LEGAL CLAIMS

28. The expenditure of public funds upon and/or the display of each of the previously described religious symbols violates the First and Fourteenth Amendments to the United States Constitution which prohibit governmental bodies from establishing or becoming excessively entangled with any religion.

29. The conduct of each Defendant, in permitting the expenditures and displays at issue, gives rise to a cause of action under 42 U.S.C. §1983 in that Defendants, while acting under color of state law, have violated the rights of each Plaintiff to be free from an establishment of religion.

30. Plaintiffs have suffered and continue to suffer irreparable injury by virtue of Defendant's actions, as described above, and they are without an adequate remedy at law with which to redress the aforementioned constitutional violations.

WHEREFORE, Plaintiffs request entry of the following relief:

1. A declaratory judgment declaring that the expenditure of public funds for the storage, erection, display and maintenance of a creche in the County Courthouse and for the storage, erection, maintenance and display of a menorah on or about the City-County Building and the display and maintenance of the creche and menorah in the Courthouse and on or about the City-County Building violate the First and Fourteenth Amendments to the United States Constitution.

2. A temporary restraining order and preliminary and permanent injunctions prohibiting Defendants from expending public resources for the display of a creche and/or a menorah and from storing, erecting, maintaining and displaying a creche and/or a menorah on or in the Allegheny County Courthouse and City-County Building.

3. An award of nominal damages.

4. An award of costs and reasonable attorneys fees to Plaintiff pursuant to 42 U.S.C. §1988.

5. Such other relief as the court may deem just and equitable.

Respectfully submitted,
On Behalf of American Civil
Liberties Union Greater
Pittsburgh Chapter
237 Oakland Avenue
Pittsburgh, PA. 15213

/s/ JAMES B. LIEBER

James B. Lieber, Esq.
American Civil Liberties Union
237 Oakland Avenue
Pittsburgh, PA 15213

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR

Plaintiffs

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,

Defendants

Civil Action No.

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, by their counsel, request the court to enter a preliminary injunction enjoining Defendants, their officers, agents, and employees from displaying, maintaining, erecting or storing a creche, on the premises of the Allegheny County Courthouse and from displaying, maintaining, erecting or storing a menorah on the City-County Building property and/or expending public resources of any kind for the display, maintenance, erection or storage of a creche or a menorah on the grounds that immediate and irreparable injury will result to Plaintiffs. The following matters are brought to the court's attention in support of this Motion:

1. Plaintiffs incorporate by reference each and every allegation contained in their Complaint as if all said allegations were fully set forth in this Motion:

2. The conduct of Defendants in displaying, maintaining, erecting and storing a creche and/or menorah in or on governmental building property used as the seat of county and city government and the expenditure of public resources for said purposes is in violation of the establishment clause of the First Amendment as incorporated by the Fourteenth Amendment.

3. Plaintiffs have demonstrated a strong likelihood that they will succeed on the merits of this action.

4. If Defendants are permitted to engage in the conduct complained of, Plaintiffs will continue to suffer immediate and irreparable harm.

5. Plaintiffs are without an adequate remedy at law with which to redress the constitutional violations at issue.

6. An order enjoining and restraining Defendants from engaging in the complained of conduct will cause considerably less harm to Defendants than that which will be suffered by Plaintiffs should the court deny the requested preliminary relief.

WHEREFORE, Plaintiffs request the entry of a preliminary injunction enjoining Defendants from displaying, erecting, maintaining or storing a creche and/or menorah on the grounds of the Allegheny County Courthouse or City-County Building.

Respectfully submitted,
On Behalf Of American Civil
Liberties Union, Greater
Pittsburgh Chapter
237 Oakland Avenue
Pittsburgh, Pa. 15213

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR

Plaintiffs

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,

Defendants

Civil Action No.

APPLICATION FOR A TEMPORARY RESTRAINING ORDER

Plaintiffs, by their counsel, request this court, upon the Complaint and Affidavits which have been filed in the instant action, to enter a Temporary Restraining Order enjoining Defendants, their officers, agents and employees from engaging in the following conduct:

1. Displaying, maintaining, storing or erecting the creche and/or menorah at issue herein, on County or City property on the grounds that immediate and irreparable loss, damage and injury will result to Plaintiffs prior to a full adversarial hearing.

2. Expending public resources in any manner or permitting the display and maintenance of the creche and/or

menorah at issue pending further order of court on the grounds that immediate and irreparable loss, damage and injury will result to Plaintiffs prior to a full adversarial hearing.

WHEREFORE, Plaintiff's request the entry of a temporary restraining order enjoining Defendants from displaying, erecting, maintaining or storing a creche and/or menorah on the grounds of the Allegheny County Courthouse or the City-County Building.

Respectfully submitted,
On Behalf Of American Civil
Liberties Union, Greater
Pittsburgh Chapter
237 Oakland Avenue
Pittsburgh, Pa. 15213

.....

James B. Lieber, Esq.
American Civil Liberties Union
237 Oakland Avenue
Pittsburgh, Pa. 15213

.....

Roslyn M. Litman, Esq.
1701 Grant Bldg.
Pittsburgh, Pa. 15219

.....

Jon Pushinsky, Esq.
1808 Law & Finance Bldg.
Pittsburgh, Pa. 15219

.....

Professor Richard Seeburger
University of Pittsburgh
School of Law
Pittsburgh, Pa. 15260

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, et al.,

Plaintiffs

v.

COUNTY OF ALLEGHENY, a political subdivision of the COMMONWEALTH OF PENNSYLVANIA. et al.,

Defendants

Civil Action No.

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY } ss:

MARK N. STAITMAN, being of full age, and duly sworn upon his oath, deposes and states, as follows:

1. I am an ordained Rabbi, having been ordained in 1975, and having prior to that earned a Bachelor of Arts degree in Sociology and Philosophy from the California State University at Northridge in 1970, and a Master of Arts in Hebrew Letters from the Hebrew Union College in Los Angeles, California in 1973.

2. I am an Associate Rabbi of Rodef Shalom Congregation located at 5th and Morewood Avenues in the City of Pittsburgh, Allegheny County, Pennsylvania, and I have served there as Spirtual Leader since June, 1975.

3. Rodef Shalom Congregation is the largest Jewish Congregation in the Commonwealth of Pennsylvania.

4. The Chanukhah menorah is a symbol of the religious holiday of Chanukhah.

5. Judiasm considers the Lighting of the Chanukhah menorah to be a religious act.

6. The Chanukhah menorah is viewed by most people as the sole, tangible symbol of the holiday of Chanukhah.

7. Most people, including many Jews, would regard a Chanukhah menorah as a religious symbol and, indeed, it is generally regarded as a religious symbol.

/s/ MARK N. STAITMAN
Mark N. Staitman

SWORN to and SUBSCRIBED before me
this 10th day of December 1986.

/s/ DEBORAH M. LENART
Notary Public

DEBORAH M. LENART, Notary Public
Munhall, Allegheny Co., PA
My Commisson Expires May 22, 1989

AFFIDAVIT OF ELLEN M. DOYLE

ELLEN M. DOYLE, having been duly sworn, deposes and states the following:

1. I reside at 4345 Schenley Farms Terrace in Pittsburgh, Pennsylvania, and I am employed as a lawyer at 508 Law & Finance Building, Pittsburgh, Pennsylvania.

2. I am the Chairperson of the Greater Pittsburgh Chapter of the American Civil Liberties Union ["ACLU"]. The ACLU receives numerous complaints each year about the display of religious symbols in our government buildings.

3. By letters dated November 13, 1986, I wrote to the Allegheny County Commissioners and to the Mayor of the City of Pittsburgh on behalf of the ACLU, requesting that the County and the City refrain from erecting religious symbols, including a creche and a menorah, in the City-County Building and in the Courthouse.

4. On November 26, 1986, and on December 2, 1986, I walked through the Allegheny County Courthouse and observed the nativity scene which is prominently displayed on the steps leading from the main Grant Street entrance to the first floor of the building.

5. The nativity scene has twenty or more figurines, including the Christ child, Mary, Joseph, the three kings, and an angel overhead, in or near a wooden manger with a log fence barrier. The fence is approximately 9 feet long and consumes more than half of the width of the broad staircase. The angel figurine is holding a banner which states "Gloria in Excelsis Deo." Between the manger scene and the log fence barrier is a sign which states "This Display Donated By The Holy Name Society".

6. There were no other decorations erected near the nativity scene on November 26, 1986 or on December 2,

1986, but there was a podium and a loudspeaker on the latter date and in prior years there have been some poinsettas and an organ located near the nativity scene at which Christmas carol concerts were performed.

7. On December 2, 1986, a group of approximately 60 high school students who were in the Courthouse waiting to visit the courts were massed around the nativity scene. I was very disturbed that the students would be in the Courthouse to observe our legal system at work and, instead of learning about the Constitutional prohibition against the establishment of religion, would view the erection of a nativity scene by the local political authorities.

8. When I grew up, our family had a very beautiful nativity scene which we erected in a place of prominence in our living room. On Christmas eve, we would gather around the nativity scene and read the Gospel Christmas story. During the Christmas season, we would also visit a number of the more beautiful nativity scene in the area.

9. In my own home today we have a small nativity scene which we place on the mantle in our living room. My husband and I also have begun the tradition of reading the Christmas story to our children on Christmas eve.

10. I believe that Christmas has religious significance and that the nativity scene represents for many persons, the portrayal of significant religious views which do not represent or are antithetical to their own.

11. In my childhood I was not permitted by my church or my family to participate in the religious ceremonies of persons of other faiths. For example, I would not participate in the lighting of the menorah during the Hannukah celebrations of my Jewish friends because I believed that to do so was inconsistent with my own religion.

12. Because of my early religious training, I am still uncomfortable participating in the religious ceremonies of others, and I am particularly sensitive to the imposition of other persons' religious customs and observances on both myself and others.

/s/ ELLEN M. DOYLE
Ellen M. Doyle

SWORN to and SUBSCRIBED before me
this 10th day of December 1986.

/s/ GERALDINE B. HUNTER
Notary Public

GERALDINE B. HUNTER, Notary Public
Pittsburgh, Allegheny County
My Commisson Expires August 13, 1990
Member, Pennsylvania Association of Notaries

AFFIDAVIT OF HILARY SPATZ LEVINE

I, Hilary Spatz Levine, having been duly sworn according to law, do hereby aver as follows:

1. I am a resident of the City of Pittsburgh, County of Allegheny.

2. I am a lawyer engaged in the private practice of law in Allegheny County.

3. As a practicing attorney, I am required to appear in the Allegheny County Courthouse and/or City-County Building several times a week.

4. Over the past few years, I have observed the nativity scene at the Courthouse each December.

5. I am a member of the Jewish faith and the display of religious symbols, particularly the nativity scene at the Courthouse, leaves me both angered and upset.

6. As I view the nativity scene to be a basic symbol of a religious group to which I do not belong, the government's display of that symbol indicates that the government, itself, adopts that religious symbol as its own.

7. Since I do not embrace the symbol of the nativity scene displayed by the government at the Courthouse, I feel that the government is engaging in a practice which conveys a message to non-christians that they are materially different from the majority.

8. I feel it is inappropriate and offensive for any governmental entity to adopt any religious symbol, and as that act represents participation by government in religious affairs of its citizens which are to be protected from sup-

port or interference by the state, I believe that the display of the menorah is likewise objectionable.

/s/ HILARY SPATZ LEVINE
Hilary Spatz Levine

SWORN to and SUBSCRIBED before me
this 10th day of December 1986.

/s/ GERALDINE B. HUNTER
Notary Public

GERALDINE B. HUNTER, Notary Public
Pittsburgh, Allegheny County
My Commisson Expires August 13, 1990
Member, Pennsylvania Association of Notaries

AFFIDAVIT OF MAX A. LEVINE

I, Max A. Levine, having been duly sworn according to law, do hereby aver as follows:

1. I am a resident of the City of Pittsburgh, County of Allegheny.

2. I am a lawyer engaged in the private practice of law in Allegheny County.

3. As a practicing attorney, I am required to appear in the Allegheny County Courthouse and/or City-County Building several times a week.

4. Over the past few years, I have observed the nativity scene at the courthouse each December.

5. I consider myself to be a member of the Jewish faith and the display of religious symbols, particularly the nativity scene at the Courthouse, leave me both angered and upset.

6. As I view the nativity scene to be a basic symbol of a religious group to which I do not belong, the government's display of that symbol indicates that the government, itself, adopts that religious symbol as its own.

7. I feel it is inappropriate and offensive for any governmental entity to adopt any religious symbol, and as that act represents participation by government in religious affairs of its citizens which are to be protected from sup-

port or interference by the state, I believe that the display of the menorah is likewise objectionable.

/s/ MAX A. LEVINE
Max A. Levine

SWORN to and SUBSCRIBED before me
this 10th day of December 1986.

/s/ GERALDINE B. HUNTER
Notary Public

GERALDINE B. HUNTER, Notary Public
Pittsburgh, Allegheny County
My Commisson Expires August 13, 1990
Member, Pennsylvania Association of Notaries

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,
Plaintiffs

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania.
Defendants

Civil Action No. 86-2617

MOTION TO DISMISS

The Defendant, City of Pittsburgh, files the following Motion to Dismiss Plaintiffs' Complaint pursuant to Fed.R.Civ.P. 12(b)(6) for the following reasons:

1. The Complaint fails to state a claim upon which relief can be granted.

2. The Complaint fails to state a cause of action.

3. The allegations of Plaintiffs' Complaint taken together with evidence adduced at the hearing on Plaintiffs' Motion For Preliminary Injunction demonstrate conclusively that the Complaint does not state a claim upon

which relief can be granted nor does the Complaint state a cause of action.

CITY OF PITTSBURGH

By: .....
George R. Specter
Deputy City Solicitor

.....
D. R. Pellegrini
City Solicitor

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,
Plaintiffs

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,
Defendants

Civil Action No. 86-2617

MOTION OF CHABAD TO INTERVENE AND TO ADDUCE LIMITED EVIDENCE

Pursuant to Rule 24(a) and (b) of the Federal Rules of Civil Procedure and Rule 29 of the Rules of Court of the United States District Court for the Western District of Pennsylvania, CHABAD hereby respectfully moves to be permitted to intervene as a party to this proceeding and to participate in this lawsuit as fully as if it had originally been named as a defendant by the plaintiffs, in support of which it avers as follows:

1. CHABAD has an interest in the subject matter in litigation, i.e., the "menorah" and the display thereof.

2. Disposition of the action may impair or impede its ability to protect that interest.

3. CHABAD's interest is not adequately represented by the existing parties.

4. Intervention would be in the public interest and would contribute to the fair and impartial administration of justice.

5. CHABAD is the owner of the menorah in question and for approximately the past five years has sought and received permission from the City of Pittsburgh to display this menorah on the steps of the City-County Building. Plaintiffs' request for an injunction against the City to prevent the display of this menorah, interferes with CHABAD's right of free speech and constitutional right to display the menorah on the City steps, and impairs and injures its ability to protect that right if denied the right to participate in this suit.

6. Denial of CHABAD's Motion to Intervene in this case, which is expected to be appealed by Plaintiffs, could foreclose CHABAD from displaying menorahs on public property throughout the United States. CHABAD currently participates in such displays of its menorahs in numerous cities throughout the United States, including a large menorah display in Lafayette Park across from the White House in Washington, DC.

7. CHABAD and the City's interests are not identical. The City's purpose in displaying the menorah is as part of an overall seasonal display. It defends on grounds that it is not, as alleged by Plaintiffs, violating the establishment clause of the Constitution. Although CHABAD would also defend on these grounds, it further contends that any ruling in favor of Plaintiffs would interfere with CHABAD's constitutional right of free speech. Denial of the motion would foreclose CHABAD from effectively asserting this claim. Filing an amicus curiae brief does not adequately protect these rights, if the record, as here, is not complete.

8. This Motion to Intervene is timely and all parties have been served with a copy of this Motion.[1] The action herein was filed late in the day of December 10, 1986, and the hearing date was set by order of the court dated Thursday, December 11, 1986. The hearing was scheduled for Monday, December 15, 1986. On December 11, 1986, the undersigned was asked by CHABAD for legal aid. Inasmuch as the undersigned is an employee of the Federal Government, he is not permitted to represent private parties without the express approval of the General Counsel of his Federal Agency, the National Labor Relations Boards. Such approval could not be secured by the time of the hearing. Moreover, counsel was out of town from early in the morning of December 12, 1986, to late in the day of December 14, 1986. Counsel did appear as a spectator and friend of CHABAD at the preliminary injunction hearing on December 15, 1986. However, when it became obvious to the undersigned and the CHABAD representative that intervention was a necessity, the undersigned orally moved on behalf of CHABAD for intervention, albeit at some personal risk to the undersigned's job. The District Court denied the motion at such time on the basis that the parties had not been served with a copy of the Motion and that it was untimely to intervene in the hearing on the preliminary injunction during such time that the hearing had already commenced. The instant motion for intervention is made with respect to the permanent injunction.[2] As will

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[1]In the event that the court wishes CHABAD to file an Answer to the Complaint, CHABAD will do so.

[2]The instant motion would have been filed even prior to this time, but CHABAD was not informed as to the parties' request to close the hearing and forego adducing any further evidence and plaintiffs' apparent desire to appeal, until January 12, 1987. Thus, prior to such time, there was, as a practical matter, nothing to "intervene in", because there was no indication that plaintiffs intended to pursue the case further than the preliminary injunction hearing. Only after plaintiffs, defendents, or the Court would thereafter take some action, would there be any need to intervene.

be set forth in the forthcoming brief, such motion, having been filed within slightly more than one month after the filing of the Complaint and prior to a hearing on the merits of the Complaint itself, is clearly timely, especially when the practical circumstances are considered.[3] Therefore, those reasons advanced by the Court for not permitting CHABAD to intervene in the middle of the preliminary injunction hearing do not apply to the instant Motion.

9. CHABAD has already been prejudiced by being denied its earlier request to intervene in that it was unable to cross-examine witnesses at the preliminary injunction hearing who gave inaccurate and/or misleading testimony to the Court. Nor was CHABAD able to adduce relevant evidence as to the nature of the object being displayed. CHABAD was not informed until January 12, 1987, that the parties had asked the court at a conference of counsel on January 8, 1987, to close the record. This request of the court was made despite the knowledge of counsel for the City that CHABAD strenuously opposes the closing of the record at this time.[4] Neither was CHABAD informed of the City's Motion to Dismiss filed on or about December 30, 1986, nor of the January 7, 1987, Order of the Court for

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[3]On January 5, 1987, counsel for CHABAD received permission from the General Counsel of the National Labor Relations Board to represent CHABAD in the status of a private citizen, not as a representative of the Board. Accordingly, counsel for CHABAD wishes to stress that any views stated by counsel for CHABAD are not those of the Federal Government or the National Labor Relations Board and that he is participating on a pro bono basis and in the status of a private citizen, and not as a Federal or Board employee.

[4]Counsel for Chabad does not mean to in any way be critical of counsel for the City, or the City itself, but merely cites the above as evidence that the interests of Chabad are not identical to those of the City and that there is a strong potential of prejudice if Chabad is not permitted to intervene.

the Filing of Briefs on the City's Motion to Dismiss. Furthermore, CHABAD was not present at the aforementioned conference of counsel before the Court in which the Court encouraged the parties to resolve the matters before it, including the display of our menorah. CHABAD is a necessary party to these proceedings and a denial of CHABAD's motion could lead to a court decision or a non-court settlement contrary to CHABAD's interests.

10. The instant case involves important constitutional issues and has national implications. Because of CHABAD's particular expertise, it has a special ability to bring before the court evidence relating to the part-secular, part-religious nature of the menorah, which will have an important bearing on the legal issues which Plaintiffs have placed and will place before this and appellate courts. In this connection, CHABAD seeks to adduce evidence, as set forth in the attached declaration, as to the nature of the object it seeks to display. Plaintiffs obviously and correctly deem the nature of the object to be critical to this proceeding, as evidenced by its Complaint, Memorandum, and evidence presented at the preliminary injunction hearing.

11. It is requested that this court receive this Declaration into evidence, as well as pictures of the menorah display which are now in the possession of the City. As an alternative to admitting the Declaration into evidence, it is requested that the court reopen the prior hearing, or conduct a hearing on the Complaint with respect to the request for a permanent injunction, for the limited purpose of admitting the testimony of the declarant of the Declaration, subject to cross-examination.

12. The evidence set forth in the Declaration is critical to the issues before this court and all reviewing courts. If not permitted, then this court and all reviewing courts will not have an adequate description of the menorah in question.

13. No party would be prejudiced in any way by the granting of this Motion and the hearing would not be unduly delayed by the granting thereof. To the contrary, because of the considerable public interest, a full and complete record is in the best interest of the parties, the public, and the administration of justice. There would be no delay to these proceedings whatsoever if the attached Declaration if permitted to be introduced into evidence. If the attached Declaration is not permitted to be introduced into evidence, then the undersigned would estimate the direct examination needed to adduce such evidence to be 15 minutes to one-half hour.

14. It is further noted that CHABAD was permitted to intervene in a similar proceeding before the Superior Court of the State of California for the County of Los Angeles. Although this was before a state and not a federal court, similar issues were before the state court. A copy of the application to intervene, and Order Granting Leave to Intervene are attached hereto.

WHEREFORE, Counsel for CHABAD respectfully requests that the Court grant the instant Motion.

Dated at Pittsburgh, Pennsylvania, this 16th day of January 1987.

/s/ CHARLES H. SAUL

CHARLES H. SAUL, ESQUIRE
Counsel for CHABAD
5808 Northumberland Street
Pittsburgh, PA 15217

DECLARATION OF RABBI YISROEL ROSENFELD

I, RABBI YISROEL ROSENFELD, declare:

1. I am an ordained Orthodox Jewish rabbi. I have personal knowledge of the facts set forth in this Declaration, and if called as a witness could and would testify competently thereto.

2. My expertise in matters of Judaism, Jewish law and Jewish ritual and customs is based in part on the following:

a. In 1975, I received my ordination (Smicha) from the Central Yeshiva, Tomshei Tmimim Lubavitz of the United States of America.

b. In 1977, I received a special Ordination (Smicha Yudin Yudin), which permits me to serve on a rabbinic court and render Jewish legal decisions. Such ordination was from one of the foremost Jewish authorities in the world and is the highest ordination that is available in Jewish law.

c. I have authored and published several responsa on difficult areas of Jewish law (a "Responsum" is an inquiry, directed to a rabbi of reputed expertise in matters of Jewish law, concerning technical or problematic interpretations and applications of Jewish law.).

d. Since 1975, I have taught and lectured on Jewish law and customs at numerous Jewish institutions of higher learning, including an Orthodox rabbinic college. Most recently, since about 1980, I have served as principal of Yeshiva Achei Tmimin, a Jewish day-school (parochial school), which teaches Judaica to students from pre-school through high school.

e. In addition to teaching Jewish law and customs at Yeshiva Achei Tmimin, I have lectured extensively and

taught adult Jewish educational courses at synagogues and other Jewish institutions of higher learning.

f. I serve as a rabbinic legal consultant to members of the Jewish community of Pittsburgh, Pennsylvania.

LACK OF RELIGIOUS SIGNIFICANCE OF PUBLIC MENORAH DISPLAYS

3. It is incorrect, as alleged by plaintiffs, to construe the menorah as a "purely religious symbol" (p. 7 of Plaintiff's Memorandum). It is incorrect, as alleged by plaintiffs, to conclude that the menorah "simply has no secular use or significance" (p. 8 of Plaintiff's Memorandum). Furthermore, it is incorrect, as alleged by Plaintiffs, to construe the menorah as a purely sectarian object. Based upon my knowledge and understanding of Jewish law, I conclude that these claims of plaintiffs are not true.

4. I am familiar with the laws and procedures for lighting Chanukah Menorahs. All of the laws and procedures in Jewish law regarding the Chanukah Menorah pertain *solely* to an individual's own Chanukah lighting done in the privacy of his or her own home.

5. Jewish law prescribes no requirement, commandment, rite or ritual pertaining to lighting a Chanukah Menorah in a public place. It is not considered sinful or improper or a ritual omission to fail to light a Chanukah Menorah in a public place.

6. The only requirements of Jewish law pertaining to the lighting of a Chanukah Menorah deal with lightings in the home. The following example makes this clear: there has evolved a *custom* in some Jewish communities of lighting a Chanukah menorah in the synagogue. However, even if one attends a public Chanukah lighting in a synagogue, one is still obligated to light a Menorah at home, since the public lighting does not constitute a religious

ceremony, nor does it fulfill any religious obligation. The ritual obligation of lighting Chanukah candles is only fulfilled by the candlelighting at one's home.

7. In other Jewish communities, there has *not* evolved a custom of lighting a Chanukah menorah in the synagogue. This failure to light the Menorah in the synagogue does not violate any rule or principle of Jewish law.

8. Therefore, in my opinion, the lighting of a Chanukah menorah in a public forum such as the steps of the City-County Building does not constitute a "religious" act. What is important to the Jewish faith is the lighting of menorahs at home.

9. Chanukah celebrates historical facts as well as religious events. One principal significance of Chanukah is that it recalls the Maccabees' rebellion against the Hellenists. The story of that rebellion teaches the universal messages that the weak can conquer the mighty and the few can conquer the many when they stand up for truth and religious freedom. Chanukah also teaches a message of the victory of individual rights against tyranny and dictatorship. These messages are similar to American concepts of political rights.

10. The publicly displayed Menorah, separated from the ritual of lighting in the home, connotes more strongly the historical, political and cultural significance of Chanukah, rather than its religious significance. To the extent Chanukah celebrates the historical events surrounding the Jewish people winning political freedom from their Hellenist oppressors, Chanukah is analogous to the Fourth of July, which celebrates political freedom.

11. The only religious aspect of the menorah is not the object itself, but rather the act of lighting it in one's *home*. The menorah's only religious function comes into play when it is lit in the home. Even when lit in a synagogue,

the significance of the menorah is only to remind us of the historical events of Chanukah. In a public place, outside of a synagogue, the lights have significance only as a seasonal display.

12. In my opinion, a public display of a menorah on the steps of the City-County Building is a display of seasonal goodwill and a reminder of historical and political events, rather than a devotional religious exercise. It is an appropriate way for Jews to participate in a seasonal display with our Christian friends, next to whose Christmas tree the menorah stands.

COMPARISON WITH CHRISTIAN SYMBOLS

13. The menorah is not a symbol of the Jewish religion in the sense that the cross is a symbol of the Christian faith.

14. The menorah is not analogous to a creche. The creche depicts a baby which Christians view as the Son of G-d. The menorah depicts no deity, is not worshipped, and, as described above, has no religious significance when placed outside the home.

15. If, for purposes of legal analysis, one were to compare a menorah to a Christian object, it would more closely be analogous to a Christian tree. By its very name, the Christmas tree draws attention to a Christian religious holiday. However, in addition to whatever religious significance it may have, it also serves as a symbol of seasonal goodwill—much in the same way, as described above, that the menorah does. In addition, many Christians who are not otherwise religious may display Christmas trees in their homes at the holiday season as a focus of family togetherness, as a place to exchange gifts, and to emphasize the feeling of goodwill and rejoicing. Similarly, many Jews who are not otherwise religious display menorahs at the holiday season and light candles in them for the very same

reasons. Both the menorah and the Christmas tree are stimulants to the improvement of human nature toward the goal of peace on earth and goodwill among all.

16. In the Jewish religion, truly sacred religious objects are distinguished by careful, elaborate rules governing their creation and disposal.

17. The treatment of Torah scrolls provides the most straightforward example of this. The Jewish religion has careful rules governing the materials from which Torah scrolls may be made, including the particular kinds of parchment used. In addition, a Torah, once it wears out, may not be disposed of in a haphazard fashion or by simply discarding it. The worn out Torah must be buried according to a particular ceremony. Similar rules govern T'fillin (phylacteries), Mezzuzot (Torah passages on small parchments, affixed to doorways), Tzizit (fringes worn on clothing) and many other sacred objects.

18. Chanukah menorahs are not treated in the same way. There are no required materials from which a menorah must be made. A perfectly acceptable menorah can be fashioned from any materials, including whiskey shot glasses or bottle caps. Additionally, there are no limitations on what can be done with a Chanukah menorah which wears out, or which its owner simply wishes to replace. It can simply be thrown away. Such a menorah can be melted down (if metal) and used for other things. There are no restrictions governing the disposal of a menorah as there are for Torah scrolls or other sacred writings or objects.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on this 16th day of January 1987 at Pittsburgh, Pennsylvania.

/s/ RABBI YISROEL ROSENFELD
Rabbi Yisroel Rosenfeld

SUBSCRIBED and SWORN to in my presence
this 16th day of January, 1987.

/s/ ALICE J. JONES
Notary Public

ALICE J. JONES, Notary Public
Pittsburgh, Allegheny County
My Commisson Expires April 19, 1990
Member, Pennsylvania Association of Notaries

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,
Plaintiffs

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,
Defendants

CHABAD
Intervenor

Civil Action No. 86-2617

MOTION TO DISMISS

CHABAD hereby files this Motion to Dismiss Plaintiffs' Complaint, as amended, pursuant to Fed.R.Civ.P. 12(b)(6), for the following reasons:

1. The Complaint, as amended, fails to state a claim upon which relief can be granted.

2. The Complaint, as amended, fails to state a cause of action.

3. The allegations of Plaintiffs' Complaint, as amended, taken together with evidence adduced at the hearing on Plaintiffs' Motion for Preliminary Injunction and the Declaration offered by Intervenor, demonstrate

conclusively that the Complaint, as amended, does not state a claim upon which relief can be granted nor does the Complaint, as amended, state a cause of action.

Dated this 22nd day of January 1987 at Pittsburgh, Pennsylvania.

.....

CHARLES H. SAUL,
COUNSEL FOR CHABAD
5808 Northumberland Street
Pittsburgh, PA 15217
(412) 521-5778

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,
Plaintiffs

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,
Defendants

Civil Action No. 86-2617

RESPONSE OF PLAINTIFFS REPRESENTED BY THE AMERICAN CIVIL LIBERTIES UNION IN OPPOSITION TO THE MOTION TO INTERVENE AND ADDUCE LIMITED TESTIMONY BY CHABAD

Plaintiffs American Civil Liberties Union, Ellen Doyle, Michael Antol, Wendy L. Colby and Max Levine, respond to the motion of CHABAD to intervene and adduce limited evidence as follows:

1. Denied as a conclusion of law to which no responsive pleading is required. However, it is admitted that CHABAD has an ownership interest in the menorah. It is further denied that CHABAD has cognizable interest in displaying the menorah on the City-County Building steps which are not a traditional public forum.

2. Denied as a conclusion of law. It is further denied that any ownership interest in the menorah or protected right of CHABAD will be impeded or impaired.

3. Denied. Any interest which CHABAD has within the scope of this litigation has been adequately and faithfully protected by the Defendant City of Pittsburgh.

4. Denied. Intervention would not be in the public interest in that it needlessly would delay and complicate the proceedings. It would not result in the fair and impartial administration of justice in that it would re-direct the litigation belatedly in a manner not prepared, framed, tried or argued by the original parties who had sought a just resolution on a narrow question of law and fact pertaining to an alleged unconstitutional establishment.

5. It is admitted that CHABAD is the owner of the menorah and has received permission from the City to display it on the steps of the City-County Building. Otherwise, this paragraph is denied as containing conclusions of law to which no response is required.

In addition, it is specifically denied that CHABAD has a constitutional right to display the menorah on the City-County Building steps, which are not a traditional public forum and which violates the establishment clause.

6. It is denied that denial of the Motion of Intervene could "foreclose CHABAD from displaying menorahs on public property throughtout the United States," as this is a conclusion of law to which no responsive pleading is required. However, it is additionally denied, because this suit does not address religious displays on such public property as parks, streets, sidewalks and other traditional public fora, but only the government headquarter properties of the Defendants herein. Plaintiffs are without knowledge or information sufficient to form a belief as to the

averment regarding other displays by CHABAD are beyond the scope of this case.

7. All the averments in this paragraph are denied as conclusions of law to which no responsive pleadings are required. Further, it is denied that CHABAD's interests are not sufficiently akin to the Defendant City of Pittsburgh. CHABAD, for approximately five years, has sought and recieved the City's permission to display the menorah on the steps in front of the City-County Building. The City defended against the imposition of a preliminary injunction in order to afford the same permission to CHABAD as in previous years, and indeed gave CHABAD permission, after the denial of the preliminary injunction, thus allowing the menorah to be displayed. The City likewise has accommodated CHABAD by storing the menorah as in previous years. As set forth above, it is denied that CHABAD hs a free speech and exercise right to display on the pertinent steps, which are not a public forum. It is further denied that denial of intervention herein bars CHABAD from asserting its putative claim if and when justiciable, in another forum, though it denied that the claim is colorable. It is specifically denied that the record is not complete in that all parties to the action have stipulated that the record is complete. It is denied that an *amicus* brief would not be sufficient. Further, an *amicus* brief would be less burdensome and more conducive to judicial economy.

8. It is denied that the Motion to Intervene is timely. Plaintiffs are without information or belief as to the truth of Mr. Saul's averments regarding his schedule, travel and federal agency dilemmas. However, it is denied that these are material, because CHABAD, rather than Mr. Saul, is the would-be intervenor, CHABAD learned of the pending hearing on December 11, 1986, four days in advance and has put forth no reason why it could not have retained

other counsel in the interim or appeared *pro se*.. In addition, Mr. Saul had access to Plaintiffs' documents and attorneys when the suit was filed and knew or should have known that it involved an establishment clause challenge to the placement of the menorah. It is further denied that the instant written motion for intervention is timely, in that it was filed over a month after the denial of the oral motion and the judgment from the bench denying intervention on December 15, 1986. If CHABAD wished the Court to reconsider the Court's initial decision on intervention, it had an obligation to file a motion to alter or amend or reconsider within ten days pursuant to Fed. R.Civ. P. 59(e).

9. It is denied that CHABAD was prejudiced by the conduct of the preliminary injunction and that CHABAD was a necessary party, because the Defendant City adequately and faithfully represented the interests of citizens, including those in CHABAD. It is admitted that CHABAD has not been a party to conferences involving the parties. Otherwise, Plaintiffs are without knowledge or information sufficient to form beliefs regarding the averments in this paragraph, which are therefore denied. Further, Plaintiffs object to this paragraph as burdensome, confusing, indirect, unconcise and violative of Fed. R.Civ. P. 8(e).

10. It is admitted that this is an important constitutional case. It is denied that CHABAD has demonstrated particular expertise within the context of the litigation.

11. It is admitted that CHABAD has made requests to the Court. It is denied that these requests serve justice nor do more than delay the proceedings and burden and prejudice original parties.

12. It is denied that the evidence in the Declaration is critical. All parties herein have stipulated that the record is

complete, and the Court needs no other evidence or testimony to render a just decision on the merits.

13. It is denied that no party would be prejudiced by intervention. Plaintiffs who proceeded based on the Establishment Clause would have to re-brief and argue their case to rebut a free exercise and/or speech claim. The proceedings have already been subjected to considerable delay despite efforts of all parties to stipulate, narrow the issues, and close the record. A hearing including direct and cross-examination of the Declarant would be time consuming; further, Plaintiffs would seek to introduce rebuttal testimony, experts and treatise material as well as making additional argument. Plaintiffs submit that a hearing on the putative claim of intervenor's could take at least another court day. Preparation of arguments and briefs would add to already considerable expenditures of funds and time. In addition, other religious groups may seek to intervene if this motion is granted, thus further complicating and delaying the proceedings.

14. Denied as a legal conclusion to which no responsive pleading is required.

WHEREFORE, Plaintiffs respectfully request that the Court deny the Motion to Intervene.

Respectfully submitted,

.....

Roslyn M. Litman, Esquire

Jon Pushinsky, Esquire

James B. Lieber, Esquire
Counsel for Plaintiffs

on behalf of the American
Civil Liberties Union

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,
Plaintiffs

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,
Defendants.

Civil Action No. 86-2617

ANSWER OF THE DEFENDANT, CITY OF PITTSBURGH, TO MOTION OF CHABAD TO INTERVENE AND TO ADDUCE LIMITED EVIDENCE

The defendant, City of Pittsburgh, files the following Answer to the Motion of Chabad to Intervene and to Adduce Limited Evidence:

1. Denied. To the contrary, Chabad's alleged interest is neither one protected in law or one which would constitute an interest under the relevant Rules, as the basic question herein is whether the City of Pittsburgh ("City") can erect the display at issue.

2. Denied. Disposition of the within action has no effect on Chabad as it has no interest herein.

3. Denied as Chabad has no interest in the subject matter of this litigation.

4. Denied for the reason set forth in Paragraphs 1-3 above.

5. It is admitted that Chabad is the owner of the Menorah in question. The implications of the remainder of Paragraph 5 are denied as the City has permitted erection of the Menorah solely as part of an overall seasonal display. Such display is solely at the discretion of the City, and Chabad has no right in law to display the Menorah. Further, the City-County Building is not a public forum and neither Chabad nor any other person or entity has any right to make any display therein or thereon.

6. Denied. If Chabad is not a party in this action no decision herein could adversely affect its rights.

7. Denied. Chabad has no interest in the within litigation and accordingly comparison of its interest with the City's is irrelevant and academic. For the reasons set forth in Paragraph 5 above, Chabad has no right which is at issue herein.

8. The City does not contest the timeliness of the Motion to Intervene.

9. Denied. Is further alleged that Chabad has suffered no prejudice as it has no interest in the within proceedings. Chabad's lack of knowledge of post-preliminary injunction proceedings are irrelevant as Chabad is not a party, has no right to participate as such or to be informed of any such proceedings or to receive such notices as are required by rules of Court to be given to parties.

10. The allegations of Paragraph 10 are irrelevant as Chabad has no interest in this case. Accordingly, such expertise as Chabad may have is irrelevant and academic.

11. Counsel for the City has requested that Counsel for Plaintiffs agree to make the subject pictures part of the record. The City has no objection to admitting Chabad's Declaration into evidence so long as Chabad does not become a party herein.

12. It is denied that the Declaration is critical to the issues herein, but the City has no objection to admitting the Declaration into evidence so long as Chabad does not become a party.

13. Denied. The City would be prejudiced by grant of the Motion to Intervene because Chabad has no interest herein, and seeks to assert rights not at issue and not necessary to a fair and complete determination of the case.

14. The intervention of Chabad in a state proceeding in the State of California is irrelevant here. Further, the Order of the Superior Court of California does not set forth any reason in law for the intervention there permitted and accordingly constitutes no precedent herein.

FIRST AFFIRMATIVE DEFENSE

Chabad seeks to inject as an issue in this case its alleged right of free speech under the First Amendment which is not now an issue herein.

SECOND AFFIRMATIVE DEFENSE

Chabad's intervention would require introduction of evidence regarding the alleged rights of all members of the public who seek to utilize the City-County Building for displays, none of which evidence is necessary for a determination of the issues pending presently among the parties. Such collateral issue and evidence relating thereto

would protract unnecessarily the existing case and impose upon the present parties excessive costs neither required nor warranted by existing issues.

THIRD AFFIRMATIVE DEFENSE

The basic issue between the parties is whether the City's display violates the Establishment Clause of the First Amendment and the City can adequately represent any party supporting the validity of such display.

FOURTH AFFIRMATIVE DEFENSE

Chabad's interest in the case is no different than that of any person or entity supporting the City's position.

FIFTH AFFIRMATIVE DEFENSE

Chabad can by leave of Court file an amicus curiae brief and thus advocate its position on the issues pending in the case.

WHEREFORE, the Motion of Chabad to Intervene and to Adduce Limited Evidence should be denied.

CITY OF PITTSBURGH

By: /s/ GEORGE R. SPECTER
George R. Specter
Deputy City Solicitor

/s/ D. R. PELLEGRINI
D. R. Pellegrini
City Solicitor

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,
Plaintiffs,

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,
Defendants

Civil Action No. 86-2617

STIPULATION

It is hereby stipulated that the Menorah was taken down on Tuesday, January 13, 1987 by City employees and placed in storage on City premises.

/s/ ROSLYN M. LITMAN
Counsel for Plaintiffs
American Civil Liberties Union
Greater Pittsburgh Chapter,
Ellen Doyle, Michael Antol,
Reverend Wendy Colby,
Howard Elbling, Hilary Spatz
Levine and Max A. Levine

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,

Plaintiffs,

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,

Defendants

Civil Action No. 86-2617

STIPULATION

It is hereby stipulated that the Nativity Scene was taken down by Father Yurko on Friday, January 9, 1987 and stored as heretofore in the basement of the County Court House.

/s/ ROSLYN M. LITMAN

Counsel for Plaintiffs
American Civil Liberties Union
Greater Pittsburgh Chapter,
Ellen Doyle, Michael Antol,
Reverend Wendy Colby,
Howard Elbling, Hilary Spatz
Levine and Max A. Levine

In The

United States District Court

For The Western District of Pennsylvania

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,

Plaintiffs,

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,

Defendants

Civil Action No. 86-2617

STIPULATION

The parties hereto agree that the record in this case shall be considered to be complete and shall serve as the record for the purposes of the Court's ruling on the plaintiffs' request for a permanent injunction and other relief.

/s/ Roslyn M. Litman

Counsel for Plaintiffs
American Civil Liberties Union
Greater Pittsburgh Chapter,
Ellen Doyle, Michael Antol,
Reverend Wendy Colby,
Howard Elbling, Hilary Spatz
Levine and Max A. Levine

In The

United States District Court

For The Western District of Pennsylvania

AMERICAN CIVIL LIBERTIES UNION, et al., *Plaintiffs*		**Civil Action**
v.		**86-2617**
COUNTY OF ALLEGHENY, et al., *Defendants*		

ORDER

AND NOW, March 16, 1987, the motion of Chabad to intervene and to adduce limited evidence is granted. A hearing is fixed for April 24, 1987, at 10:00 A.M. in Court Room No. 6 where the limited evidence may be presented.

/s/ Barron P. McCune

Barron P. McCune
SENIOR UNITED STATES
DISTRICT JUDGE

cc: Counsel of
record.

[2]

(Court convened at 10:40 a.m.)

THE COURT: Good morning, ladies and gentlemen. We're ready to proceed at 86-2617.

You may proceed, Ms. Litman.

MS. LITMAN: Your Honor, may I address the Court in a brief opening to outline what the plaintiff intends to prove?

THE COURT: Certainly.

MS. LITMAN: May it please Your Honor, as you know, the plaintiffs have brought this suit requesting the Court to enjoin the County of Allegheny from continuing to display the unadorned Nativity scene which sets as of now in the Allegheny County Courthouse, and to enjoin also the City of Pittsburgh from erecting, or permitted to be erected in front of the City-County Building on the steps a Hanukkah Menora, which it is the City's declared intention to do, because we believe that these actions violate the Establishment Clause of the United States Constitution.

We will prove, Your Honor, by our testimony here today, that the purpose of these Governmental bodies in displaying the Nativity Scene and the Menora is not secular. Furthermore, that the effect of the Nativity scene is to advance religion. Similary, that the effect of the Menora is to advance religion. And further, that the County on the one hand, and the City on the other are excessively entangled with the respective [3] religions whose religious symbols are involved. Namely, that of Christianity and that of Judaism.

As part of our proof, Your Honor, we will prove to you that the County of Allegheny owns the County Courthouse, which is the seat of County government in Allegheny County, and which houses a number of the Allegheny County Courts. In that respect, Your Honor, it is much like the building we are in here, the Federal Courthouse, which houses a number of the, which houses the Federal Courts of the Eastern District of Pennsylvania. And in that regard it is particularly significant, because we must remember, and we will show you, Your Honor, that with the County Courthouse many of the people who are there are there under compulsion of law. Some of those are, of course, criminal defendants, because, of course, the criminal courts are in the County Courthouse. Some of those are jurors who are required by law to attend the courts and to fulfill their responsibilities as citizens acting as jurors. Many of those are witnesses who are there under the compulsion of the subpoena power of the Allegheny Courts. So that that building, as this building, is a building which houses those courts and which requires the attendance of those people.

In addition, however, unlike this building, but making it even more the seat of County government, we will show you, Your Honor, that in the Allegheny County Courthouse there is the Office of the Commissioners of Allegheny County, there is [4] the Office of the Clerk of Courts, there are the courthouses, there are the courts for civil cases worth under less than $20,000. There is the Office of the County Controller, there is the Office of the County Treasurer, there is the Office of the Sheriff, and in addition, there are the offices for obtaining passports, among other offices, Your Honor.

We will prove to you, sir, that in late November there was erected on the main staircase of the Allegheny County Courthouse at about the first landing a Nativity scene. The

staircase being something at at other times of the year is used for the purpose of ingress and egress, it being the main staircase. We will prove to you, Your Honor, that the Nativity scene takes somewhere between one-half and two-thirds of the area provided by the staircase, and that the scene consists of a number of figures, traditional figures whose significance is found in the Christian Gospels, the Gospels of Luke and Matthew. And we will describe what the, witnesses will describe what these traditional figures are. They include, of course, the baby Jesus Christ, Mary, Joseph and the others who find their origins in the Gospels of Christianity.

In addition, Your Honor, in front of the Nativity scene, we will show, and we will introduce photographs so that Your Honor will be able to see, that there is a sign that reads "Donated by the Holy Name Society." And we will prove to [5] Your Honor, through the testimony of the witnesses, that the Holy Name Society is a Catholic society, and that its purpose is the veneration of the name of Jesus Christ. In addition to that sign, Your Honor, atop the manger in the Nativity scene in the courthouse there is an angel, and in that angel's hand there is a banner, and the banner reads, "Gloria In Excelsis Deo," in the Latin. The English translation being, Glory to God in the highest, which is a direct quotation from the Gospel of Luke, Chapter 2, Verse 14.

We will provide further, Your Honor, that in the past the City of Pittsburgh and the County of Allegheny have permitted to be displayed on the steps of the City-County Building a Hanukkah Menora. Now, the City-County Building is for the City, the counterpart of what the courthouse is for the County, because, indeed, in the City-County Building, as Your Honor knows, and as we will show, there is the, there are the courts of the County that are the Civil Courts. In addition to those courts, where

again people must come by compulsion, such as I enumerated with the County Courthouse, and such as we have here in the Federal Courts, they are again, the seat, the offices of the seat of City government, because we have the Mayor's Office, we have the City Council, we have the Prothonotary where all filings are done in the Civil Courts, we have the Marriage License Bureau where people must go if they wish to obtain a marriage license, we have the City [6] Treasurer's Office, we have the Pittsburgh Commission on Human Relations, we have the Allegheny County Bar Association, the Allegheny County Law Library, the Allegheny County, not only Court of Common Pleas, but the Orphans' Court, Your Honor, the Family Division, we have the Allegheny County Register or Wills, we have the Pennsylvania Supreme Court and its Prothonotary. We have the City of Pittsburgh Parks and Recreation. These, among others, Your Honor, are the offices which are at the seat of City government and County government, and to which the people of the community must go in carrying out the business of the City and the County with regard to those offices.

Now, there are a number of plaintiffs, Your Honor, each one of them is a taxpayer of Allegheny County. Many of them are also taxpayers of the City of Pittsburgh. They have all seen the Nativity scene, and those who are called to testify will described to Your Honor their reaction and why the Nativity scene in the courthouse is something which is offensive to them.

The plaintiff, Ellen Doyle, will testify. She, Your Honor, will testify that she is a resident of Allegheny County and the City of Pittsburgh and a taxpayer. She is a lawyer who practices in Allegheny County and whose practice brings her before the courts and into the County Courthouse and the City-County Building in connection with her work. [7] She is also the Chair at the present time

of the Greater Pittsburgh Chapter of the American Civil Liberties Union. She will testify, Your Honor, that she, indeed, has great respect for, reverence for and feeling for a Nativity scene or creche, and indeed, maintains one in her own home. But she will testify to the Court that with respect to the Nativity scene in the courthouse, that this is something which in her judgment is offense to the Constitution of the United States, and indeed, contravenes the requirements of the Establishment Clause of the First Amendment.

Reverend Wendy Colby, who is also a plaintiff, is a Unitarian minister, Your Honor.

There are several other plaintiffs who are lawyers, but there is one in particular whom I would like to point out to the Court, Mr. Elbling is not only a lawyer, but he is a law clerk whose offices are, whose Judge's chambers are in the Allegheny County Courthouse. He will testify that his work requires him to go to the courthouse where he must attend every working day, and that in doing that he sees the Nativity scene. He will testify that he is a, by religion, a member of the Jewish religion, and that the view of the Nativity scene carries for him the message that the County of Allegheny endorses Christianity, and that this is not his religion.

Plaintiff Malik Tunador, Your Honor, is a United States citizen, who is a naturalized citizen who has come to this [8] country from the country of Turkey. He will testify that he is a resident and a taxpayer of Allegheny County, and that he is a member of the Moslem faith. He will explain, Your Honor, that he has great feeling for and respect for all religions. In fact, he is an active member of the Western Pennslyvania Chapter of the National Conference of Christians and Jews, which has as one of its purposes the elimination of discrimination among all religions. But he will testify, Your Honor, that for him a view

of the Nativity scene is, indeed, an announcement, or has the meaning that his government, the County of Allegheny, endorses the religion of Christianity. He will explain to Your Honor that on a recent occasion when he went to the courthouse for the purpose of renewing his passport, and in viewing the Nativity scene, to him, this is something which his religion forbids. That is to day, the pictorialization of God in the Moslem faith, as he will explain to you, is something which is prohibited. So that pictures of, or statues of the concept of God in the Moslem faith is contrary to his religion. And that although he respects the rights of others, of Christians to have a Nativity scene, and although he has great feeling for and understanding of those religions, as the Moslem religion teaches him to have, and although he believes people should be free to have Nativity scenes in other places, that to him it is an inappropriate place to have it at the seat of [9] County government.

The plantiff will call, Your Honor, three experts. Father Greg Swiderski, who is a Catholic priest, who will testify, Your Honor, that he has seen the Nativity scene at the courthouse, and that, indeed, it is a religious symbol. Reverend Robert Brashear, a Presbyterian minister, who will testify that he has seen the Nativity scene. He will testify as to its meaning, and he will affirm also that it is a religious symbol.

Now, with respect to the case of the Menora, as the Court knows, the Menora has not yet been placed upon the steps this year. What we will prove, Your Honor, that the plaintiff, Ellen Doyle, as Chairperson of the American Civil Liberties Union, wrote the Mayor and pointed out to the Mayor that having a Menora on the steps of the City-County Building was violative of the requirements of the First Amendment and its preclusions against the government from establishing religion. She will testify further,

Your Honor, that the Mayor responded on behalf, he said of him and the County, and said that the, the governments involved intended this year to once again display the Menora. In that regard, your Honor, I have not said, but we will prove that the City and the County jointly own the City-County Building, and we will call a rabbi, Rabbi Mark Staitman, who is a clergyman of the Jewish faith here in the City of Pittsburgh, and he will testify, Your Honor, [10] that the Menora is a religious symbol.

In the course of the testimony of the experts, Your Honor, we will establish that the Nativity scene has no secular purpose. We will show Your Honor that it is erected this year, as in past years, only at the Christmas season. This, Your Honor, will basically be our case.

We will put in testimony that the County, during the year when the Nativity scene is not being displayed actually stores the Nativity scene on County property. We think that the sign on it clearly indicates that it is the property of the County, having been donated by the Holy Name Society.

With respect to the Menora, Your Honor, we have subpoenaed the City records in that regard. We have also subpoenaed the County records, and were told that each of the defendants will be forthcoming with a witness who will be prepared to testify as to the maintaining and erection of the items in question.

We will certainly show you, Your Honor, that they are displayed. We will show you that the Nativity scene is, indeed, stored, and perhaps the Menora as well. And at the close of our case we will ask you, Your Honor, to issue an injunction declaring that each of the governmental bodies who are defendants here are violating the First Amendment of prohibition against the establishment of religion, because they are endorsing religion, and under the case

law, as we [11] understand it, what they are doing is proscribed by the Constitution.

Thank you, Your Honor.

THE COURT: All right. Call your first witness.

MS. LITMAN: Your Honor, before I do that, may I move, for the purposes of this case, the admission of Ruthy Teitel, who is a member of the Bar of New York. Ms. Teitel is the Assistant Director for legal affairs, national legal affairs of the Anti-Defamation League. She is a member of the Bar of the City of New York and has been admitted to the Bar of the United States Supreme Court.

THE COURT: We'll be pleased to admit her.

MS. LITMAN: At this time, Your Honor, I would like to offer into evidence a stipulation which has been signed by the County of Allegheny and the plaintiffs, and if I may pass one up to the Court.

What that—

THE COURT: We'll make the stipulation part of the record.

MS. LITMAN: Thank you, Your Honor.

THE COURT: This stipulation establishes that the courthouse is owned by the County and the County Courthouse represents the seat of government, and the particulars that the County Commissioners meet and maintain offices there, the majority of the County Court of Common Pleas, Criminal [12] Division trials are conducted there, that civil cases involving amounts not in excess of $20,000 are initially heard there, the County Clerk of Court's is located there, that is, in the courthouse. The Allegheny County Controller maintains his office there, the Treasurer, Sheriff, as well as numerous official offices are located in the courthouse. And that from the conclusion of

last year's display until this erection of the display this year the Nativity scene figures have been stored on County property.

It will be made part of the record.

MS. LITMAN: Thank you, Your Honor. Shall I call my first witness?

THE COURT: Sure.

MS. LITMAN: Father.

GREGORY SWIDERSKI, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MS. LITMAN:

THE COURT: This chair up here, Father.

MS. LITMAN: Your Honor, is the microphone on?

THE COURT: The light is on. If he speaks up I think we can all hear him without it. This is a hard room to be heard within, but we'll try to speak so everybody can hear.

MS. LITMAN: Okay.

[13]THE COURT: Go ahead.

Q. Father Swiderski, would you repeat, again, your name, please.

A. Gregory Swiderski.

Q. And you are a priest in the Catholic Church; are you?

A. Yes.

Q. Would you tell us, Father Swiderski, at the present time where are you located and what do you do?

A. I'm Associate Pastor at St. Raphael's Church in Morningside.

Q. And how long have you been Associate Pastor there, Father?

A. Four years.

Q. Would you please tell us a bit about your background in terms of your educational background leading up to the time you became ordained?

A. I attended grade school and high school at St. Albert's on the South Side of Pittsburgh.

Q. Is that a parochial school, sir?

A. Yes. And four years of college at St. Mary's College in Orchard Lake, Michigan, a college seminary established to prepare young men to work with Polish American Catholics. And then, four years of theology at St. Francis Seminary, Loretto, Pennsylvania, after which I was ordained in 1972.

Q. And then, starting in 1972, just can you bring us up to [14] your present pastorship?

A. In 1972 until 1977 I was Associate Pastor at St. Elizabeth's Church in Baldwin/Whitehall, and then for six months I was Associate Pastor at St. Benedict the Moor in the Hill District, and then for about four and a half years Associate Pastor at St. Mary's Parish, 46th Street, Lawrenceville, and then St. Raphael's.

Q. Now, in the studying that you did in your preparation to become an ordained priest in the Catholic Church, did that study include the study of the Bible, the Gospels and other religious doctrine?

A. Yes.

Q. Father Swiderski, would you tell us, please, whether you have seen the Nativity scene which is presently on display at the Allegheny County Courthouse?

A. Yes, I have.

Q. With respect to the Nativity scene, can you tell us what is the meaning of a Nativity scene?

A. A Nativity Scene is a, is a Catholic sacramental, in that it is a representation of something holy, with statues, and in particular, the Nativity scene represents the Gospel of Matthew and Luke, and the figures that are mentioned there as having been the birth of Jesus Christ, or who had visited that birthplace.

Q. And can you tell me whether, Father Swiderski, the [15] Nativity scene is a religious symbol?

A. Yes, of course.

Q. You say, "of course". Can you tell me why it is a religious symbol; what you say that?

A. The symbols are figures sometimes depicted with halos, the imagery of the word made flesh in the Christian tradition being represented in this baby born in a stable with swathling clothes, born of a virgin and of a man named Joseph, and of course, the scriptures. Luke presenting the message of the shepherds, and Matthew of the wisemen, who come in adoration. And then Luke, of course, also mentioning the angels who, and the star which appear to the shepherds as a guide to the birth of the infant.

Q. You said it represents the word made flesh; it that what you said? Can you explain what you mean by that?

A. The Christian understanding of God's presence in the world would say that and believe that God did not

remain aloof, but that God made a promise, and that God we believe in fulfills his promises, and promise, in particular, that promise is that his love would not, would become enfleshed in and would bring salvation for the whole world. So that God's word speaks, and in kind of distinction to sometimes the human experience when words betray and are used for lies and hurt and pain, the word of God is one that is fulfilled and the enfleshment of that word is the very sacred character [16] in that that word becomes real and tangible, and that we would say that Jesus Christ is like us human beings in all things but flesh.

Q. And is that—

A. I mean, but sin. I'm sorry. I didn't want to get my theology wrong here.

Q. And is that what I indicated the Nativity scene then represents?

A. Yes.

Q. I'm going to ask you to explain the figures in the scene in just a moment, but I'd like to ask you first, the Holy Name Society, can you tell us, Father, do you know what the Holy Name Society is?

A. Yes. I discussed that with you yesterday.

Q. Would you then tell us for the Court, what is the Holy Name Society and what is its purpose?

A. The Holy Name Society is a national organization of Catholic men established to promote the veneration for the name of Jesus, and that based on the, one of Paul's writings, where the name of Jesus, every knee should bend, and if I recall, evolved from the abuse of

the name of God, in particular, of Jesus, in the workplace. And so was there to establish for men a motivation to reverence the name of Jesus. It has a national office, as well as local diocesan offices, and that in each parish, or not in each parish, but in [17] many parishes there are individual groups of men who elect officers, have a fraternal organization in our parish. They meet once a month.

Q. And when you saw the Nativity scene on display at the Allegheny County Courthouse, did you see a, the reference to the Holy Name Society?

A. Yes.

Q. Does that reference carry any special significance with respect to this Nativity scene in connection with whether it is peculiarly Catholic as opposed to generally Christian, Protestant and Catholic?

A. Yes, in that the Holy Name Society, and also the Nativity scene itself, although I would not know that much about Protestant tradition, but the Catholic, our Catholic tradition has used, as I said, sacramentals, which were metals, rosaries and statutes in other figures, and so Catholic tradition would establish that these figures of saints and religious figures would be uniquely Catholic. Whereas the Protestant tradition such images would not be as often promoted. And then, the Holy Name Society is, as I said, a uniquely Catholic organization.

Q. Father Swiderski, with respect to the angel atop the manger in the Nativity scene, do you recall what the reading was, the words were on the angel's banner?

A. Gloria In Excelsis Deo.

[18] Q. And can you tell us—I assume that's Latin?

A. Yes.

Q. Father, what is the English translation of that?

A. Glory to God in the highest.

Q. And can you tell us, what is the source of that; is that a quotation from Catholic religious doctrine?

A. Well, it's originally from Luke, which would be Christian. However, Latin is usually associated in the past in the Catholic Church with worshipping at a Catholic Church, and—

Q. Let me ask, where in Luke is that quotation to be found?

A. Luke 2, 14.

Q. All right. Father Swiderski, just for your assistance in the testimony you are going to give, because I'd like to ask you to describe the figures, I'm going to place before you a set of photographs marked for identification purposes as Plaintiffs' Exhibits 3 through 13, which will be authenticated and offered into evidence by a later witness. But to the extent you might want to refer to those to refresh your recollection, you may feel free to do so.

Would you please, then, Father Swiderski, tell us just what figures appear in the Nativity scene at the courthouse.

A. Well, start at the top, we have, of course, the angel with the banner.

Q. And that's the banner that you just described the words of; is that right?

[19] A. Yes. And then, of course, the stable itself, the structure.

Q. And what are the figures?

A. And there's the ox and the ass.

Q. Can you tell me when you describe the figures, what the source is for those figures?

A. Well, the ox and the ass in some ways are partially presumed to be, would have been in the stable. But also, some of the scriptures, I can't exactly give you a quote from the Hebrew scriptures, but would have been one. Symbols that would have been part of the projected Christian theology would have looked back to the Hebrew scriptures and show how they were fulfilled in Jesus Christ. And so the animals there, as well as the swathling clothes, the infant in the manger come from that Hebrew scripture.

Q. Incidentally, you refer to the Hebrew scriptures. In that sense, are you talking about those that discuss the coming of the Messiah?

A. Yes.

Q. And, of course, it is the Christian theology that the events in the Nativity scene represent; is that correct?

A. Yes.

Q. All right. Now, what are the other figures?

A. The figure of Mary and Joseph.

Q. And how are they depicted in the Nativity scene?

[20] A. Well, in kneeling in front of the infant, Mary usually is wearing blue. She is here with the veil, and the infant also is laying on a white cloth, which is also a tradition of, we use a white cloth on our alters as a symbol, when we say that Christ becomes present in the Eucharist, and there's a certain tradition about that. And there are, of course, the sheep, and there are

shepherds, and the shepherds come from Luke's Gospel, as well as the angel. There's no strict tradition about how many shepherds, just that there were shepherds who came.

Q. And in the Nativity scene at the courthouse, how may are placed there?

A. Three.

Q. What other figures are there?

A. There are the wisemen or astrologers, or kings, depending on which name you prefer or translation.

Q. And from what Gospel source do they come?

A. Matthew.

Q. And how many are there in the Nativity scene at the courthouse?

A. Three.

Q. And how are those figures shown; in that, what posture are they?

A. They are presenting gifts. One is kneeling and two are standing.

[21] Q. Are there any other figures, Father?

A. There is a camel. You don't mind me saying, we don't know how all three got there on one camel, but there's one camel and one servant, and he's standing.

Q. And around the stable is there also straw?

A. Yes.

Q. Now, you made a reference to Nativity scenes in your church, in your, in the Catholic Church. It is common

to have, and usual to have a Nativity scene at the Christmas time of year?

A. Without a doubt.

Q. In the particular Nativity scene at the courthouse, did you, when you saw it, notice that it was framed by anything?

A. Yes.

Q. And what is it framed by?

A. Well, there's a bannister, wooden bannister, and then there are small evergreen trees with red bows and red and white poinsettias.

Q. And is framing the creche with red and white poinsettias, or greens, is that something which is common or usual as well in a Catholic Church?

A. I would imagine, yes.

Q. Well, have you seen—

A. Oh, yes, yes.

Q. Okay. Father Swiderski, does the Nativity scene have [22] any secular significance?

A. I would say, no.

Q. Okay. Can you tell the Court where else besides the, your Catholic Church, where in this area one could find creches or Nativity scenes?

A. Well, probably the two Catholic Churches in Pittsburgh, or in the Golden Triangle, St. Mary's at the Point or Epiphany. Some stores have them on display, various homes all over the area have them in front lawns and in their windows.

Q. Are you aware of the Nativity scene in Oakland at the Carnegie Museum, for example?

A. Yes, I am. The museum, yes.

Q. In your reaction as a Catholic Priest, Father Swiderski, is the Nativity scene at the courthouse, as you saw it, an appropriate display of the Nativity scene as you understand it and saw the one there?

A. Appropriate?

Q. Well, tell me—let me ask this. What was your reaction to the Nativity scene at the courthouse?

A. Well, the courthouse, as the document the Judge has says, is a place of, a maze, an office where City government events take place. I notice there that behind the Nativity scene there were some microphones, and those microphones were there for Christmas groups which were coming to offer music, and I suppose one of my thoughts was that those groups, in looking [23] down at the Nativity scene in front of them, might truly be communicating the religious nature of the feast, and that there might be, because some of them were public schools, might be students who were not sharing in the Christian faith, might present to in a graphic way, a very symbol of promoting the religious nature of the feast. One of the reasons that I would find, that I find the placing of the Nativity scene in the place of government somewhat offensive is that we're aware, well, I'm aware that sometimes government has not been true to values that are honest, authentic, sincere and genuine, and that the Nativity scene depicts virtues of honesty, integrity and so forth, and that they, those figures might convey, in a certain sense, could convey to me part of the, as this courtroom does, the awesomeness of the experience of coming into that building and cloak it with a meaning

of certain religiousness that might be intimidating to someone who is coming there for some of the business that you related, to which you related earlier. And so the sense of giving it that kind of blessing of religion, to me, is inappropriate, and in some ways unfortunate.

There are many people also who have called, for instance, Pittsburgh City Council a circus, and to have a religious symbol related to that building would seem inappropriate. I also find it in a difficult time when I think of the purpose of religion, to have a prophetic witness, a prophetic voice [24] often to speak in contradistinction or contrariety to various facets.

Our Catholic Bishops have just issued an economics pastoral speaking to the business community, and offering and suggesting a witness on behalf of the concerned for the poor, but when one is wedded too closely with business or with government, I would think that that prophetic witness would suffer.

I have read sections of Deuterol's Democracy in America, in which he speaks of the value of religion in this country. In his observations, in this country, he being a practicing Catholic makes the observation that he sees that when government and religion become too aligned, that ultimately the religious value is maybe lost, or so meshed together that it loses its integrity. And I think—

THE COURT: Why don't you ask another question now so that we can proceed to the point.

MS. LITMAN: Well I think, Your Honor, that that concludes the direct.

THE COURT: I beg your pardon?

MS. LITMAN: I think that concludes the direct testimony for the witness.

A. May I just add the example in my mind, excuse me, is in our country, is in Iran, where religion and politics have mixed.

[25] Q. Thank you.

MS. LITMAN: Cross examine.

MR. SPECTER: No questions.

MR. McTIERNAN: Just briefly.

CROSS EXAMINATION

BY MR. McTIERNAN:

Q. Father, you testified the Nativity scene is a religious symbol to you. The birth of Jesus was also a historical event; wasn't it, Father?

A. The birth of Jesus, as a historical event? It is, by even secular, like Josephus, an event that took place in history, yes.

Q. And the purpose of the Nativity scene is, at least in part, to depict the actual event that took place; isn't it, Father?

A. Yes. May I add, though, that the figures that surround the Nativity, that the matter of fact, one of the more interesting debates that we would have, or discussions in studying the scriptures is how historical are these figures, because the writers, Luke and Matthew, would see in those figures, pointing to a much deeper and profound spiritual experience, and that the historical value is very, in a certain sense, very little, because they are meant to point to a much deeper and more profound message.

Q. So, you're saying, to you, Father, it represents much [26] more than just a historical event; it has a religious significance to you personally?

A. Certainly.

Q. And you've made reference to a scriptural quotation at the manger scene. Isn't it a fact, Father, regardless of how historically unaccurate those scriptures are in your view, it's an important source of our knowledge of that event, the scriptural account of the birth of Jesus?

A. An important historical—

Q. Well, an important source of knowledge about the events; would you say that's a fair statement?

A. Well, I would say not about the birth, actual birth. I mean, Mark's Gospel does not say anything about the birth of Jesus, and that was the first Gospel who, that was written, even before that St. Paul wrote his letters, previous to Mark, and he says nothing about the birth of Jesus.

Q. The birth of Jesus is mentioned in the Christian scriptures; isn't it?

A. Oh, yeah. I'm saying in Matthew and Luke, but they appeared later. What I'm saying is that historically the birth of Jesus was not that important to the Gospel writers, the actual facts about the birth.

Q. Apart from the theological account and view that you're giving, Father, I'm just asking you about your statement which concerned a quotation from the scripture, St. Luke I believe it [27] was, and that scripture does provide an account of this event; does it or doesn't it, Father, yes, or, no?

A. The scriptures do, yes.

Q. Yes. And that is where that quotation is taken from, that account of this event?

A. Yes.

Q. And the events, the text that you refer to, at least, is a description of the origins of the national holiday that we celebrate as Christmas?

A. Yes.

Q. Now, you mentioned that there were some flowers and trees around this particular display, Father; correct?

A. (Nods.)

Q. And in your experience is it common for there to be flowers and evergreen trees around any Christmas display; have you ever seen them, for example, with respect to any other non-Nativity scene display for Christmas at Christmas time?

A. Ever seen poinsettias without a Nativity scene?

Q. Right.

A. Yes.

Q. Or evergreen trees and poinsettias displayed with some other holiday display?

A. Yes.

Q. That's all I have, Father.

[28] MR. McTIERNAN: Thank you.

REDIRECT EXAMINATION

BY MS. LITMAN:

Q. Father, the County Solicitor, Mr. McTiernan, has asked you about the account of the birth of Jesus, as

to whether this is a recitation of some historical event. So, in that context let me ask you this. You mentioned that a historian, Josephus, mentioned Christ in his writings; is that right?

A. True.

Q. Is it correct that that, indeed, is the only historian of that period who mentioned Jesus?

A. As far as I know, he's the only secular story, yes.

Q. Secular, right. And with respect, then, to the secular historical writings, is it correct that there is no recitation of the actual birth of Jesus, the secular historical writing?

A. As far as I know.

Q. And the account that Mr. McTiernan says that the writings of Luke provide of the the birth of Jesus, that comes from the religious writings of Christianity; is that right?

A. Yes.

Q. With respect to the scene depicted in the Nativity scene, in addition to showing the birth of the infant, doesn't it also show the, the Christian belief of the incarnation, or the, what you talked, what you talked about earlier, that is, the birth of what the Christian religion believes was the [29] Messiah; isn't that what's depicted in the Nativity scene?

A. Yes.

MS. LITMAN: No further questions.

MR. McTIERNAN: No questions, Your Honor.

THE COURT: We all through? I guess you can step down, then.

MR. PUSHINSKY: At this time the plaintiffs would call Ellen Doyle to the stand.

ELLEN M. DOYLE, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PUSHINSKY:

Q. Miss Doyle, would you please state your full name for the record.

A. Yes. My name is Ellen M. Doyle.

Q. I notice before you were called to the stand that you were doing a lot of coughing. Would it be helpful for you to have a glass of water on the witness stand?

A. Yes, thank you.

Q. Miss Doyle, would you please state your address for the Court.

A. 4345 Schenley Farms Terrace, Pittsburgh, Pennsylvania, 15213.

Q. You own or rent your own home?

A. We own our home.

[30] Q. Do you pay any taxes?

A. Yes, we do.

Q. Tell us some of the taxes that you pay as a homeowner.

A. We pay County and City taxes.

Q. Give us a little bit of your educational background, and you can skip up to high school.

A. Okay. I graduated from the Emma Willard School, which is a boarding school in New York. I attended Wellsley College for two years, and then graduated from Northeastern University with an B.A. in 1972, and in 1975 I graduated from Northeastern Law School in Boston, Massachusetts.

Q. Did you become licensed to practice law in Pennsylvania?

A. Yes, I did.

Q. When was that?

A. 1975.

Q. Since 1975 have you been employed as a lawyer?

A. Yes.

Q. Can you tell us what jobs you've had as a lawyer?

A. Yes. My first job was as the Executive Director and Staff Counsel for the Greater Pittsburgh Chapter of the American Civil Liberties Union. I did that from, I think, '76 through, I believe, 1978. I then worked for the Pennsylvania Human Relations Commission as Assistant General Counsel. And I did that from 1978 to 1982. And I am now in private practice with the law firm of Berger, Kapetan, [31] Malakoff & Meyers. And I've been doing that for almost four years.

THE COURT: Can you hear, gentlemen? All right.

Q. Would you please try to speak up?

As a lawyer, have you had occasion through the years to appear before the Court of Common Pleas of Allegheny County?

A. Yes, I have.

Q. Do you have any current association with the American Civil Liberties Union?

A. Yes, I'm currently the chairperson of the Greater Pittsburgh Chapter of the ACLU, and I'm also vice-president of Pennsylvania ACLU.

Q. Are you also a member of the organization?

A. Yes, I am.

Q. As the chairperson of the local organization, can you outline your duties?

A. Yes. I am head of the Board of Directors, and I'm at chair Board meetings. I also am head of the Executive Committee and chair those meetings, and I'm responsible for a lot of the, some of the administrative development and policy making Board of the organization.

Q. Through your association with the ACLU, as an employee in the past, and currently as a chairperson of the organization, have you become familiar with the overall guides, goals, of the organization?

[32] A. Yes, I have.

Q. What are those goals?

A. The protection of the constitution and constitutional rights of individuals, with specific concern for rights protected under the Bill of Rights.

Q. How does the organization go about trying to accomplish these goals?

A. In a number of ways. One is through legislation, through litigation and public education. And then some administrative and other kinds of work. We take complaints from people complaining that their civil liberties have been violated, and we review those

complaints and do what we believe is maybe informal or formally litigate on behalf of complainants.

Q. With respect to the litigation the ACLU engages in, where do the attorneys come from who are engaged in this litigation?

A. Most of the work is performed by volunteer attorneys who are members of the organization.

Q. Do you know why the ACLU got involved in this lawsuit.

A. Yes, I do.

Q. And why was that?

A. We've had complaints for a number of years, and we've, about the erection of the religious symbols at the City-County Building and at the County Courthouse. I would say every year I can remember in the past we've had complaints, and it's been a matter of concern for us, and this year we decided to [33] go to court.

Q. Have the complaints come from members of the organization?

A. The complaints have come from both members and nonmembers of the organization.

Q. Prior to initiating this lawsuit did the ACLU, to the best of your knowledge, make any effort to attempt to resolve the dispute with the City of Pittsburgh concerning the display of a Menora outside of the City-County Building?

A. Yes. I wrote a letter to the Mayor asking that the City refrain from the erection of religious symbols, including the Menora.

Q. I'm going to show you what's been marked for identification purposes as Plaintiffs' Exhibit 1, and ask you if you can tell me what that is.

A. Yes. That's a copy of the letter which I wrote, dated November 13, 1986, to Mayor Caliguiri.

Q. Would you read that letter into the record for us.

A. "Dear Mayor Caliguiri, as the holiday season approaches, the Greater Pittsburgh Chapter of the American Civil Liberties Union would request that the City and County refrain from erecting religious symbols in places of prominence in its buildings.

"Last year the Menorah, which was hung in the front of the City-County Building was ceremonially lit during each of the eight days of Hanukkah, while the creche was displayed [34] in a like setting in the Courthouse. Our complaints to you at the time about the matter did not even receive the courtesy of a response.

"We would urge you as government officials to recognize that one religious symbol is another religion's heresy, and that the government should not be involved in the support or establishment of any religious symbols.

"Very truly yours, Ellen M. Doyle."

MR. PUSHINKSY: I move Plaintiffs' Exhibit 1 into evidence.

MR. McTIERNAN: No objection.

THE COURT: It will be received.

Q. Miss Doyle, did you subsequently receive a response from the City?

A. Yes, I did. I received a letter from Mayor Caliguiri.

Q. I'm going to show you what's been marked for purposes of identification as Plaintiffs' Exhibit 2. Can you tell us what this is?

A. Yes. This is a letter dated November 18, 1986, to me, from Mayor Caliguiri.

Q. Please read that letter.

A. "Dear Ms. Doyle, with reference to your letter of November 13, 1986, it is my intention to allow a display similar to those of the past years at the City-County Building during this holiday season. As far as I know, the County Commissioners, [35] the owner of one-half of this building, agree with this decision.

"I respect your opinion, and I would hope that you would respect mine, along with many other Jews and Christians.

"Very truly yours, Richard S. Caliguiri."

Q. Do you know who Richard S. Caliguiri is?

A. Yes. He is the Mayor of Pittsburgh.

Q. Is the letter which you read on any type of letterhead?

A. Yes. It's on letterhead from the City of Pittsburgh, Richard S. Caliguiri, Mayor.

MR. PUSHINSKY: I offer Plaintiffs' Exhibit 2 into evidence.

MR. SPECTER: No objection.

THE COURT: It will be received.

Q. Miss Doyle, did you also attend to resolve the dispute with the County concerning the display of a Nativity scene in the County Courthouse prior to initiation of this lawsuit?

A. Yes. At the same time that I wrote the letter to Mayor Caliguiri, I wrote identical letters to the three County Commissioners.

Q. Did you receive any response from the Commissioners?

A. Yes, I did.

Q. What type of response?

A. The first response was that they erected the Nativity scene at the County Courthouse, and then, after the erection [36] of the Nativity scene I received a letter signed by all three of the Commissioners.

Q. Are you familiar with the overall layout of the County Courthouse?

A. Yes.

Q. In terms of where the entrances and exits are?

A. Yes.

Q. The stairwells?

A. Yes.

Q. Are you familiar with the types of government offices which are present in the courthouse?

A. Yes, I am.

Q. Have you seen the creche which this suit concerns?

A. Yes, I have.

Q. How many times?

A. At least three times?

Q. When did you first see the Nativity scene?

A. The first time I saw it was on November 26, 1986.

Q. Would you describe what you saw upon that occasion?

A. Yes. At that time the Nativity scene was set up on the County Courthouse steps. We're talking about an area between the first floor where you're walking on the Grant Street side and between the basement floor if you're walking on the Grant Street side and the first floor. The Nativity scene consisted of 20 figures, about 20 figurines set up around the front of [37] a manger, and it was, it had at the front of it a log barrier. At that time it did not have the poinsettias and the shrubs that were described by Father Swiderski.

Q. I'm going to show you, I'm going to show you what's been marked for identification purposes as Plaintiffs' Exhibit 3. Can you identify that for us?

A. Yes. That, that is the Nativity scene. It looks the way that I saw it on November 26th.

Q. Can you tell us approximately how much of the stairwell in with was taken up by that particular Nativity scene?

A. Yes. I, I would say it's certainly between a half and one-third of the stairwell, because it consumes the middle, and then you have a passageway up on the side of the stairs. I think the fence across was about nine feet across.

Q. Would it be possible to go up those stairs to the second floor without walking around the Nativity scene?

A. Absolutely not.

Q. Going to show you what's been marked for identification purposes as Plaintiffs' Exhibit 4. Can you identify that for us?

A. Yes, I can. This is the Nativity scene at the, as it looked on November 26th.

Q. And Plaintiffs' Exhibit No. 57

A. Yes. All of these are pictures of the Nativity scene as I saw it.

[38] Q. Is there any significance to you by the position of the figures in Plaintiffs' Exhibit No. 5, which is a close-up shot of 3 and 4?

A. Well, the, figures indicate that Mary and Joseph are both on their knees with their hands clasped in a praying position. One of the kings has his head bowed, and another one of the shepherds is in what I would call a genuflection position, has one knee on the ground. And another shepherd has his head bowed. I would say that they are all in praying positions.

Q. Okay. Maybe I ought to ask you at this point in time of what religion are you?

A. Roman Catholic.

Q. So, when you say that the figures, Mary and Joseph, are in a prayful position, is that the type of position you, as a Roman Catholic, may assume when praying?

A. Yes.

Q. Going to show you what's been marked for identification purposes as Plaintiffs' Exhibit 6; ask if you can describe what's in that picture?

A. Yes. That's a picture of the angel with wings outspread on top, atop the manger, and the angel is holding a banner.

Q. Did you see that when you were there on your first visit?

A. Yes, on all of my visits.

Q. What are the words on the banner?

[39] A. The words are "Gloria In Excelsis Deo".

Q. Do you know the meaning of that phrase?

A. I do.

Q. And to you, what does that mean?

A. It means, glory to God in the highest.

Q. Do you have any idea of the origin of that phrase?

A. Yes. It comes from the Gospel according to Luke.

Q. Is that something you learned as a Catholic while you were growing up?

A. Yes. In fact, every Christmas Eve my family have always gathered together and read the Gospel according to Luke.

Q. Show you what's been marked for identification purposes as Plaintiff's Exhibit No. 7. Can you tell us what's on that exhibit?

A. Well, this is another picture of the Nativity scene, showing the sign which is erected in front of the Nativity scene. The sign states, "This display donated by the Holy Name Society".

Q. Did you see that sign when you observed the Nativity scene?

A. Yes, I did.

Q. How do you interpret that sign?

A. That the Holy Name Society, which is a religious Catholic organization, gave to the County the Nativity scene.

Q. Did you ever come across the Holy Name Society before?

[40] A. Yes. My father was a member of the Holy Name Society in our parish in Massachusetts, and there were a number of signs around my church, which would be, that, you know, certain religious relics in the church were donated by the Holy Name Society, were gifts of the Holy Name Society.

Q. What did you see on your next visit, after the November 26th visit to the Nativity scene?

A. I think the next time I went was on December 2nd, and at that time the Nativity scene had some, a podium nearby and some speakers, and were also a group of about 60 high school students massed around the Nativity scene. They were there receiving orientation for a courthouse tour.

Q. I'm going to show you what's been marked as Plaintiff's Exhibit 8. Can you tell me what this picture shows?

A. Yes. That's a picture showing a corner of the Nativity scene and the group of high school students there. You can barely see, but there's a woman who was giving them orientation to the County Courthouse, and all these students were, as I said, massed around, because the Nativity scene takes up so much space, they were all around the stairs, about to go on a courthouse tour.

Q. What was your personal reaction to the display in the courthouse?

A. I was upset that the County would be erecting what I consider to be my religious symbol, and I just, in particular, [41] when I saw the students there, I was thinking that these students aren't learning about the

Establishment Clause when they go to the courthouse to find out about how County government works and there is a, you know, a Nativity scene. Seemed to me that that was opposite to what they should be learning about the separation of church and state.

Q. Have you been back to the courthouse to view the Nativity scene since December 2nd?

A. Yes. I was there on December 9th.

Q. Had the display changed in any manner?

A. The Nativity scene was by then flanked with poinsettias and some evergreens.

Q. Going to show you what's been marked for identification purposes as Plaintiffs's Exhibits 9 and 10. Would you please tell the Court if you can identify those exhibits.

A. Yes. This would be what the Nativity scene looks like, or looked like on December 9th when poinsettias and shrubs were displayed around it.

Q. I'm going to show you what's been marked for identification purposes as Plaintiffs' Exhibit 11. Can you tell us what that shows?

A. Yes. This is looking from an angle at the Nativity scene, and it shows the sign pointing to the Board of Commissioners, the Clerk of Courts and the Sheriff's Offices. In other words, giving directions if people come into the [42] building, how to find those County offices.

Q. Was that sign present when you were there in the courthouse?

A. Yes, it was.

Q. Can you see that sign with directions to the County Commissioners' Office without viewing the Nativity scene?

A. No.

Q. About how far apart from each other are the sign and the display?

A. They are close, they are probably ten feet. It's probably ten feet away.

Q. I'm going to show you what's been marked as Plaintiffs' Exhibit No. 12. Can you identify that?

A. Yes. That's the sign on the left-hand side of the staircase pointing to the Controller and Treasurer's Office.

Q. Was that sign present when you viewed the Nativity scene?

A. Yes, it is.

Q. About how far away was the sign from the display?

A. Probably, it's probably equal distance, probably about ten feet or less.

Q. Could you see the sign pointing to the Controller's Office—strike that—the Treasurer's Office, Controller and Treasurer's Office without viewing the Nativity scene?

A. No, you couldn't.

Q. Did the inclusion of the poinsettias and the little bushes [43] to the Nativity scene change your feelings about the overall display?

A. No.

Q. Why not?

A. When I grew up in our church we always had the poinsettias around the Nativity scene. Seemed to me, reminded me more of the creche in m church when I grew up.

Q. You associate poinsettias at Christmas with being normally placed around the Nativity scenes?

A. Yes.

Q. Aside from the time when you saw the students receiving orientation, did you see any people, other people around the Nativity scene?

A. Yes, I did. There were often people going up and down the stairs, and there is also a County employee who's stationed sort of across the room from the Nativity scene, which job may, in fact, be in part to protect that. I don't know what his job was, but he was there on several occasions at a desk where he gives out the Christmas caroling book.

Q. Do you know what his name is?

A. No, I do not.

Q. I'm going to show you what's been marked for identification purposes as Plaintiffs' Exhibit No. 13, and ask you if you can look at that.

A. That is a picture of the Nativity scene, and in the front [44] is the employee whom I have seen stationed at a desk across the room from the Nativity scene.

Q. That is the man who you saw stationed by the Nativity scene?

A. Yes, it is.

Q. Did you come to court today by way of Grant Street?

A. Yes, I did.

Q. Did you happen to notice if a Menora was placed outside of the City-County Building?

A. The Menora was not up on the City-County Building when I came in, when I went to work, or came to work.

Q. Have you seen the Menora on display in front of that building in years past?

A. Yes, I have. It's directly across from my office building, so I go by it every day.

Q. Are you familiar with the types of County and City governmental functions which are normally performed inside the City-County Building?

A. Yes, I am.

Q. Will you give us a couple of examples?

A. The Prothonotary's Office, a number of Civil Courts, Allegheny County Bar Association, the Mayor's Office.

THE COURT: Can't we take judicial notice of County functions within the City-County Building?

Q. Describe your recollection of the Menora which you've seen [45] in previous years outside of the City-County Building.

A. It looks like a Menora. I think it's made out of, I believe it's made out of wood. It's a fairly large structure. We are talking about probably a 12 or 15 foot span.

Q. And about how high?

A. Certainly higher, larger than a person.

Q. For approximately how many years have you seen it on display?

A. It's been on display a number of years. I've been in my office for the last, the work I'm in now is four years, and I know, I believe it's been there every year I've been there. I don't know how long it's been up.

Q. What is your reaction to seeing a Menora outside of the City-County Building?

A. Well, I'm offended by the erection, particularly when that's fronting on Grant Street. It's a government building. I'm upset with the erection of a religious symbol. It seems to me highly inappropriate to have that, that very public, very governmental, you know, looking out on everybody, any kind of religious symbol.

Q. What is it about these two objects that is so offense about being placed in a governmental building?

A. That they represent one religious view and not other religious views.

Q. Does the presence of the Menora outside of the City-County [46] Building in any way affect your feelings about the display of the Nativity scene inside the County Courthouse?

A. Well, I think, both of them I find to be religious symbols, and I think should not be erected in governmental buildings. I'm not sure, the Menora obviously is not my religious symbol. In fact, when I was a child I weasn't allowed to participate in lighting a Menora with my Jewish friends, because it was our, both the view of my religion and my family that that was somebody else's religion, and I shouldn't do it.

With respect to the Nativity scene, we had a Nativity scene in my house when I grew up, and I have one in my house on my mantle right now. That's my religious symbol, but I think it shouldn't be presented by

government to other people, because they would have the same kind of sensitivity that I have about the, you know, the religious symbols that are not my own.

MR. PUSHINSKY: At this point in time I would like to offer Plaintiffs' Exhibits 3 through 12 into evidence.

THE COURT: They will be received.

MR. PUSHINSKY: I have no further questions at this time.

CROSS EXAMINATION

BY MR. SPECTER:

Q. Miss Doyle, you indicated that there had been prior complaints to the ACLU regarding the creche?

[47] A. Yes.

Q. Had there also been prior complaints regarding the Menora?

A. Yes.

Q. From where did they come, that is, the complaints regarding the Menora?

A. I wouldn't say they came from—you mean from both members and nonmembers of the organization? I mean, I certainly heard complaints personally from members of the organization, and I, I know our office took complaints from nonmembers.

Q. You mean people would call on the telephone and complain?

A. Yes, or they would mention it to me personally.

Q. Both members and nonmembers?

A. Yes.

Q. What was the derivation of the decision on the part of the ACLU to institute the lawsuit regarding the Menora?

A. By derivation, you know, we've had complaints for a number of years. Are you asking, are you asking why did we do it now?

Q. Yes. Why did you do it now, and how did it come about that the Board, I presume, voted to do so?

A. The Board did vot we would take legal action if the County and City proceeded to do what they had done in the past, yes.

Q. To your recollection, have complaints regarding the Menora been received during the entire period of years that it [48] has been erected?

A. You're asking me for more than I remember. I know that there have been complaints in a number of prior years. Whether it was for all years that it was erected, I don't recall.

Q. But there were complaints prior to this year?

A. Oh, yes.

Q. When was the subject of instituting this lawsuit first formally raised at the ACLU?

MR. PUSHINSKY: Objection, relevancy.

THE COURT: No, I think we'll let her answer that.

A. By this lawsuit, we have talked about a lawsuit for quite a while. The question of whether, whether and when to take the lawsuit was in part put off because there was a lot of litigation around the country, I think, which we thought was describing the contours of the erection of religious symbols. Last year I think

we talked about being prepared to, to look at the question of the erection of religious symbols, to be prepared for a lawsuit for this year if we had to.

Q. All religious symbols?

A. Well, I think the only two that have been up have been the Nativity scene and the Menora, the ones that we're talking about.

Q. To the best of your knowledge and/or recollection, did any of the lawsuits around the country involve the Menora?

A. I don't recall.

[49] Q. In any event, it is correct, is it not, that the contemplation of such a suit has been in the works for at least a year?

A. We certainly considered litigation for more than a year, I would say for several years, yes.

Q. Let me ask you this question. Does the ACLU institute a lawsuit of this nature, or any other nature for that matter, pursuant to board resolution and vote?

A. Are you saying we, we certainly do on some occasions, and on some occasions where we—

THE COURT: I can't hear you.

A. Are you asking if we initiate a suit? We initiated a suit, and we're a plaintiff in this case. I think we wouldn't be a plaintiff in a suit without a Board or Executive Committee approval.

Q. Well, in this case did the Board of the ACLU, the Pittsburgh Chapter, vote to institute this lawsuit?

A. Yes, we did.

Q. Okay. And when did it do so?

A. We voted to, that, to give authority to do so, I believe at our October meeting.

Q. Was the letter which has been introduced as Plaintiffs' Exhibit 1, that is your letter of November 13th to Mayor Caliguiri, in you view a, on your part individually or an action on the part of the ACLU?

[50] A. My letter was on behalf of ACLU.

THE COURT: I didn't hear.

THE WITNESS: My letter was on behalf of ACLU.

MR. SPECTER: I have no further questions, Your Honor.

THE COURT: We all through?

CROSS EXAMINATION (Continued)

BY MR. JANOCSKO:

Q. Mrs. Doyle, you testified, I believe, that you saw poinsettias around the Nativity scene?

A. Yes.

Q. Wouldn't it be a fair statement to say that poinsettia plants and evergreen trees are traditional decorations for the holiday?

A. Yes.

Q. And that you would find them not only around a Nativity scene, but in any, in a number of other places?

A. Yes.

Q. I believe that you also testified that you sent a letter to the County Commissioners concerning the erection of the Nativity scene?

A. Yes.

Q. I'd like to show you a document that's been marked as Defendants' Exhibit No. 1.

A. Yes.

[51] Q. Can you identify that document?

A. Yes. That was the response from the three County Commissioners to my letter.

Q. And since we'd like to give the Commissioners equal time with the Mayor, would you mind reading the letter that they sent, please.

MR. PUSHINSKY: Objection, Your Honor. That's hearsay. It's not into evidence.

THE COURT: No, I think, this is cross, and she already testified on direct that she had received a letter from the Commissioners, so I suggest we make, we mark it with an exhibit number, though, so we'll know what we're talking about in the record.

THE WITNESS: All right.

THE COURT: And then you can just make it a part of the record and she need not read it out loud, it will speak for itself.

MR. JANOCSKO: Okay.

THE COURT: Could I see it?

MR. PUSHINSKY: Your Honor, I would move, then, that that be limited for use for impeachment purposes only.

MR. JANOCSKO: Your Honor, I believe that this witness has opened the door to the introduction of that document.

THE COURT: This is cross, and she said that she had written it and had received a response. So, I think it's [52] admissible.

All right. We'll make it part of the record. What's the exhibit number on it?

MR. JANOCSKO: Defendant 1.

MR. PUSHINSKY: I'm sorry, did you just move that into admission?

MR. JANOCSKO: Yes.

MR. PUSHINSKY: Your Honor, since this is cross examination, I think it is only right that the use of this letter be used only for impeachment purposes. It would not be permissible or appropriate for the County Solicitor on cross examination to be entering direct evidence.

THE COURT: I see no objection to it. We'll receive it.

MR. JANOCSKO: Thank you, Your Honor. No further questions.

REDIRECT EXAMINATION

BY MR. PUSHINSKY:

Q. Miss Doyle, one question only. In your view does the placement of poinsettias and other plants around the Nativity scene diminish the religious nature of the symbol to you as a Catholic?

A. No.

Q. Thank you.

MR. PUSHINSKY: No further questions.

[53] THE COURT: I guess you can step down, Miss Doyle.

MS. LITMAN: Your Honor, the plaintiff calls Malik Tunador.

MALIK TUNADOR, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MS. LITMAN:

Q. Your name is Malik Tunador?

A. Yes.

Q. Mr. Tunador, as you speak, if you'll just try to speak close enough to the microphone to pick up your voice; okay? Where do you live, sir?

A. I live in Crafton, Pennsylvania.

Q. What is your address?

A. 1156 Harvard Road.

Q. Are you married, sir?

A. Yes, I am.

Q. Do you have any children?

A. I have five children.

Q. Their ages?

A. Youngest one is four, the oldest one is 19.

Q. Mr. Tunador, how old are you, sir?

A. I am 47.

Q. And were you born in a country other than the United States?

[54] A. I was born and educated in Turkey, Republic of Turkey.

Q. And at what age did you leave Turkey?

A. Oh, it was about 20 years ago, so it would be 26, 27.

Q. And that would be approximately 1966 or -7?

A. 1967.

Q. And at that time, sir, did you come to the United States?

A. I came to the United States, to Pittsburgh, and I have lived in Pittsburgh since.

Q. You have to keep your voice up a bit more. Let me try to put the microphone just a little bit closer to you. There, that's good; okay?

Are you a naturalized citizen of the United States?

A. Yes, I am.

Q. And about how long have you been a citizen?

A. Eight, nine years now.

Q. Would you tell the Court, Mr. Tunador, what kind of business or occupation are you in at the present time?

A. I am educated as a mechanical engineer, and I have worked as an engineer for 20 years, ten years, and ten years ago I started my own engineering business, and for the last four years I'm solely engaged in exports.

Q. And do you have your own business, sir?

A. I have other stockholders, partners in the business, yes.

Q. But what is the name of the business?

A. Impact Marketing, Incorporated, imports, exports.

[55] Q. Mr. Tunador, to what religious faith were you born, and in what tradition have you been raised, sir?

A. My both parents are Moslem. I was born to a Moslem family.

Q. And that is, is that your religious background, sir?

A. Yes.

Q. Incidentally, Mr. Tunador, do you belong to any groups whose purpose is to stop religious and other types of discrimination?

A. Yes. I am active with the Western Pennsylvania Chapter of National Conference of Christians and Jews, and I am a member of the Panel of Americans, and also I participate in the religious dialogue group which meets once a month.

Q. Mr. Tunador, have you seen the Nativity scene which is currently on display at the Allegheny County Courthouse?

A. Yes, I have.

Q. When is the last time you had occasion to go to the courthouse, sir?

A. Last Friday was the last time I went to the courthouse, to pick up an application for the extension of my passport.

Q. And at that time did you pass by the Nativity scene?

A. Yes, I did.

Q. Had you seen it actually before that, sir?

A. In the past years, oh, about two or three years ago, I think the previous one I had an occasion to go in there.

[56] Q. At the courthouse?

A. Yes.

Q. Now, when you viewed the Nativity—oh, withdraw. Are you a taxpayer in Allegheny County?

A. Yes, I am.

Q. Mr. Tunador, when you viewed the Nativity scene, would you please describe for the Court your reaction to it?

A. Well, my religious background, Moslem religion, accepts all other religions, major religions. In fact, one of the pillars of Moslemry, to become a Moslem you have to profess believe in the gods, books and prophets, which include Jesus, Moses, from Abraham up. So, from a religious point of view I accept Christianity, as well as Judaism, as one of God's religions. However, the Moslem religion, the concept of God, God is a concept in Moslem religion, it is not a tangible being. God is omnipresent everywhere all the time, and the depiction of this concept in a tangible form is completely forbidden in Moslem religion. And it's for that reason that for centuries the painting of human beings and sculptures especially have been forbidden in Moslem religion.

So, my reaction, first reaction, personal reaction to the scene, even though I know, believe and accept that it is, it has a religious value, meaning and reverence to my Christian brothers and sisters, my personal view rather, I don't know how good I would express it, anger, or because I have [57] seen their, I see God as a tangible being, to go against, it goes against my religious belief and personal view.

Q. So that when you see the, the Nativity scene, in terms of your own personal beliefs, when you see that at the

courthouse, is it, that seeing of God shown in a statue form, is that against the precept of your religious beliefs?

A. Yes.

Q. Now, when you say that you have respect for you, your Christian brothers, let me ask you this. To you, is the Nativity scene something you view as a religious symbol?

A. To me, from my religious point of view, it has no value.

Q. What does it mean to you, what does it represent to you; does it represent some other religion?

A. It is the, it is solely the religious symbol, religious object of Christianity, as far as I'm concerned.

Q. Now, with respect to the fact that this Nativity scene is at the County Courthouse, to you have any reaction, or have you had any reaction when you saw it to that?

A. My reaction is not to the nature of the scene itself, because it, as I say, it has religious value to quite a few people. But my reaction is that it's being supported and it's being presented on a public property against the constitution of this government, and on a property that is maintained, if not built, by my personal tax money, it is maintained by my tax money, and it's, being a County seat [58] of government, it is also a place for everybody involved, every religion involved. From that point of view I am against, I feel against having one or another religion, or any religion, in fact, being supported, represented and displayed on government property.

Q. When you said before, Mr. Tunador, you said you had explained your feeling as anger, you said. Why, why was it that on seeing the Nativity scene at the Allegheny County Courthouse you felt anger?

A. Well, in this country religion and government are separated. This is supposed to be a live country, and by the government displaying, maintaining one religion's or another religion's symbols is actually discriminating against my beliefs. And as far as I'm concerned, government should stay out of religion and should not take any side as far as with any religion.

MS. LITMAN: Cross examine.

MR. SPECTER: No questions.

MR. McTIERNAN: No questions, Your Honor.

THE COURT: I guess you can step down, sir.

MS. LITMAN: Your Honor, the plaintiff has two experts who will be here this afternoon. I wonder if this might be an appropriate place, since we did not take a morning recess, for the Court to recess?

THE COURT: Well, perhaps we should take our lunch [59] recess, if they are not ready.

MS. LITMAN: Your Honor, there is one thing, if I may, the Court indicated that it would, that we would like to request the Court to take judicial notice of the functions of the City-County Building, and they are set forth in the complaint at Paragraph 26.

THE COURT: I assume no objection to taking judicial notice of the functions of the City-County Building.

MR. SPECTER: No objection.

THE COURT: Let me ask about your witnesses. Do you have another short witness now, or will they be available this afternoon? Because if there are none available now we'll just take our lunch break and come back after lunch.

MR. SPECTER: Excuse me, Paragraph 25.

MS. LITMAN: I think it's the amended complaint, 26.

Your Honor, that might be best, because then it would give us, we have, as I indicated to the Court, subpoenaed certain material and witnesses from both defendants, and that might give us an opportunity to examine those as well in the interest of expediting that testimony.

THE COURT: Would you come back at, could I suggest 1:45. That would give you an hour and a half.

MS. LITMAN: That would be fine, Your Honor.

THE COURT: Is that all right?

[60] We'll recess.

(Court recessed at 12:15 o'clock p.m.)

— — — — —

(Court reconvened.)

THE COURT: All right. Come to order. We're ready to proceed.

MS. LITMAN: Your Honor, if the Court please, we thank you for the additional time this afternoon, and we were able to work out certain stipulations which, if I may, I would like to read into the record.

THE COURT: All right.

MS. LITMAN: The City and the plaintiffs have entered into a stipulation that, first, the City-County Building is owned jointly by the City of Pittsburgh and the County of Allegheny. Secondly, that from the conclusion of last year's display up to the present time the Menora has been stored on City property. Third, the Menora is planned to be displayed shortly, up until the time the Christmas tree and the sign in front of it are removed from the City-County Building. And eight, that the City-County Building houses numerous governmental and official offices, and as to these the Court has already taken judicial notice, but I will just note for the record that the stipulation includes those same offices that were enumerated.

In addition, defense counsel have agreed, with respect [61] to the following plaintiffs, that they would testify, if they were called, in the following manner. As to Hilary Spatz Levine and Max A. Levine, that, and Michael Antol, that they would testify, the Levines would testify that they are County taxpayers; that they are admitted to the Bar; that they are lawyers whose work brings them before the courts of and into both the City-County Building and the County Courthouse; that they have seen the Nativity scene in the County Courthouse, and that they are offended by it. And furthermore, that the display of the Menora at the City-County Building does not in any way detract from or alleviate the offense that they feel at the City, at the County's display of the Nativity scene; that they are members of the Jewish religion. Michael Antol would testify in the same manner, but it is agreed that if he would testify he would say in addition that in his use of the courthouse he goes out of his way to avoid viewing the Nativity scene, and indeed, uses a side entrance to enter the building. Michael Antol is a member of the Greek Catholic religion. And finally, Reverend Wendy L. Colby would testify that she is a Reverend and Minister in the Unitarian religion; that neither the Menora nor the Nativity scene are symbols

of her religion; that she has seen the Nativity scene, and that she is offended by it.

Thank you, Your Honor.

THE COURT: With the stipulation, do you mean that [62] you finished calling your witnesses?

MS. LITMAN: No, Your Honor. That is the stipulation as to those.

THE COURT: All right.

MS. LITMAN: The plaintiff has additional witnesses, but I have been informed that there is a motion to be presented before the Court.

THE COURT: All right.

MR. SAUL: Your Honor, if I may.

THE COURT: Yes.

MR. SAUL: My name is Charles Saul. I'm an attorney, and I've been asked by ——

THE COURT: I know you, Mr. Saul. I say we're acquainted.

MR. SAUL: Yes, we are.

I have just been asked by Chabad — C-h-a-b-a-d — House to represent them in this matter. Chabad House is the owner of the Menora which is one of the subjects of this claim that's before you, and I would respectfully ask the Court permission to intervene for Chabad House as a party in interest in this matter.

I apologize for the lateness of this, and the fact that it's not in writing, but basically there have been considerable time constraints and difficulties, under all the circumstances, in getting counsel. Indeed, the counsel—I may just be heard [63] today, and the counsel which we would

expect to be representing Chabad House is tied up in court, was tied up in court last week and is in court this very day. But to protect Chabad House's right in the property and whatever constitutional rights there may be, and the permission of displaying the Menora, we would respectfully ask that the Court grant our motion to intervene.

THE COURT: Well, let me see if other counsel have any objection. I have none.

MS. LITMAN: Your Honor, the plaintiff would, plaintiffs would object for the following reason. I assume that this motion is made pursuant to Rule 24, 24(b) on permissive intervention, and I would respectfully point out to the Court that the Chabad House is not a party to this action, if, indeed, it is true, as Mr. Saul asserts, that they are actually the owners of the Menora, I don't know whether this is true, but if that is true, Your Honor, their ownership is in no way involved or threatened by the proposed order.

The proposed order that we ask in this action is to enjoin City and County from enforcing religion by allowing the display on the City-County Building, and the Chabad House will not be affected by this order. It will be free to use this Menora, if indeed it does own it, in any fashion it likes that is consistent with the consititution. It can place it in other places. And I don't think it appropriate for them to [64] be parties to this action.

THE COURT: What's you position, gentlemen?

MR. SPECTER: I have no objection to it, Judge.

THE COURT: You have no objection?

MR. SPECTER: No objection.

MR. McTIERNAN: County has no objection either, Your Honor.

MS. LITMAN: Your Honor, I would suggest that at most, if—

THE COURT: Well, now wait a minute. I must understand before I can rule.

You represent the owners of the Menora?

MR. SAUL: Correct.

THE COURT: Their ownership is not in question. What is it that you wish to vidicate on behalf of the owners of the Menora?

MR. SAUL: Well, they want to be able to continue, as they have in the past, to display the Menora on the property in question. And I believe in the interest of a full and fair hearing we need to be present to protect our rights to engage in that constitutional act.

THE COURT: Well, I guess, I guess if the city is permitted to display it, then the title to the Menora is not in question, and we'll permit the City to do it. If the City is not permitted to do it, your ownership wouldn't make [65] any difference anyhow, so I think Ms. Litman is right, there's really no issue here with respect to your ownership.

MR. SAUL: Correct. I would agree.

THE COURT: We'll let you say for the record that you encouraged the city, if that's what you wish to say, to display it, that you have no objection to their using it, and beyond that, I don't think your title is in dispute.

MR. SAUL: No, I'm not claiming it is, Your Honor, that it's the title to the Menora that's in dispute. It's our right to display it on public property that's in dispute, and I believe that's a constitutional right. In an interest of a full and fair hearing we would respectfully request that the Court permit us to come in as a party of interest.

THE COURT: Well, do you intend to advance the proposition that you have a right to display it?

MR. SAUL: Correct.

THE COURT: Well then, I guess we should ask you to address that, then, Ms. Litman, because counsel says, Mr. Saul here saying that they want to take the position that it's something that they have the right to display, and I suppose that means that they have the right to display it on a public building. So, maybe we should let him intervene.

MS. LITMAN: If I may address that, Your Honor.

First, of course, this comes as a total surprise, so although I know that Mr. Saul was aware as of the day of the [66] filing that this was filed, and we spoke briefly at the Clerk's Office on the very afternoon it was filed, but nevertheless, attempting to address what right he might have here, that would not be properly protected by the City and County. It seems to me, Your Honor, that there is nothing that would entitle them to become a party.

I point out to Your Honor Rule 24(b) on permissive intervention recites that upon timely application anyone may be permitted to intervene. I don't think that this application is timely. The hearing is, it seems to me, well over half over, that the Court may consider it, that it is a matter for the Court's discretion. And I point out to Your Honor that with respect to that, Rule 24(b) says, in exercising its discretion that Court shall consider whether the intervention will unduly delay or prejudice the adjudication of rights of the original parties. I think it might very well do that, Your Honor.

In addition, the procedure, Rule 24(c), which Mr. Saul must know, requires that a party desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. He has not done that. The purpose of that Rule,

Your Honor, is that the motion shall state the grounds and shall be accompanied by a pleading setting forth the claim or defense when such intervention is sought, and he has not complied with that. And, therefore, Your Honor, we have not [67] been given the opportunity to address this matter as the Rules provide.

Counsel has failed to provide me—

THE COURT: All right, let me rule.

I think Ms. Litman is correct. I think I'll sustain her objection on the basis of timeliness.

I regret not letting you intervene and speak on behalf of your clients, but I think Ms. Litman is correct, that—

MS. LITMAN: Thank you, Your Honor.

THE COURT: —your motion is not timely.

MR. SAUL: Well, if I could just respond to that, Your Honor.

MS. LITMAN: Thank you, Your Honor.

MR. SAUL: We have been under certain time constraints. Chabad House was never served with a copy of the complaint. I personally have been out of town from Friday morning at 7:30 'til last night at 6:30 p.m., and it really only became apparent as the evidence was being adduced this morning that our constitutional rights were being affected by this hearing to the extent that we really needed to have a presence.

I see no prejudice whatsoever to the ACLU by our intervening. I do not see any type of undue delay, and I'm somewhat shocked that the ACLU should be raising these technicalities and an organization that is supposed to uphold the rights of the individuals, their constitutional rights, and I don't [68] understand why they feel that they

are so prejudiced by our being able to intervene, so that a full and complete record could be made in this matter.

MS. LITMAN: Your Honor, if I may, I can't address—

THE COURT: I see no point in you keeping the argument going back and forth. We're cognisant of the rights of both of you, but we ruled, and we'll proceed with the hearing.

MR. SAUL: Thank you.

THE COURT: Your record, I think, is adequately protected.

MR. SAUL: Thank you.

THE COURT: All right. Call your next witness.

MR. PUSHINSKY: We call Howard Elbling.

HOWARD ELBLING, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PUSHINSKY:

Q. Please state your full name for the record.

A. Howard Elbling.

Q. Your address, Mr. Elbling.

A. 6306 Forward Avenue, Pittsburgh.

Q. Do you own that home?

A. Yes, I do.

Q. Do you pay any taxes?

A. Yes, I pay property taxes.

[69] Q. Mr. Elbling, if we commence with the post high-school education, would you tell us briefly your educational background?

A. Graduated from the University of Pittsburgh in 1973, a Bachelor's degree in English. Graduated from the University of Pittsburgh School of Law in 1977.

Q. Did you subsequently become licensed to practice law in the Commonwealth of Pennsylvania?

A. Yes, occurred in early 1978.

Q. Since becoming licensed to practice law, have you held legal positions?

A. From beginning of 1978 through September, 1980, I was a staff attorney with the Child Advocacy Legal Aid Office of Neighborhood Legal Services. From September, '80 through September, 1981, I transferred and became a staff attorney at the Homewood Office of Neighborhood Legal Services Association. In October, 1981, I accepted a part-time job as a clerk for the Honorable Raymond A. Novak of the Court of Common Pleas of Allegheny County, and at that time I also started a private practice.

Q. Have you continued in that private practice and in your position as a law clerk to a Common Pleas Judge since taking on those positions?

A. Still employed in both capacities, yes.

Q. What type of Judge is Judge Novak? Strike that.

[70] What types of cases does Judge Novak hear?

A. Judge Novak is, he's a good Judge, he's currently assigned to the Criminal Division of the Court of Common Pleas. He also is assigned on a part-time basis to the Juvenile Section of the Family Division.

Q. Where's the Judge's courtroom located?

A. His Chambers and courtroom are located at 305 County Courthouse.

Q. What floor of the courthouse is that on?

A. Third floor.

Q. What are your duties as Judge Novak's law clerk?

A. My primary duty is to research and write opinions on cases that have been appealed. I also screen his mail, I also review all pre- and posttrial pleadings that come through the court, advise him on these matters. From time to time I serve as a master in the juvenile section during detention hearings at Shuman Center. I sit in chambers with the Judge during pretrial and posttrial conferences, listen to arguments of counsel.

THE COURT: Isn't that enough?

Q. What type of cases do you handle through your private practice?

A. General practice of law, criminal cases, civil cases, Family Division matters, estates.

Q. Does your position as a law clerk to Judge Novak require [71] you to be in the courthouse?

A. Yes, it does.

Q. How frequently?

A. Approximately three, four days a week.

Q. Does your private practice necessitate your presence in the courthouse?

A. On occasion.

Q. Could you perform your duties as a law clerk without going to the courthouse?

THE COURT: Obviously not.

A. No.

THE COURT: Next question.

Q. What would happen to your private practice if you were not to attend the courthouse?

THE COURT: Obviously a private practitioner has to go to the courthouse once in a while.

Next question.

Q. Do you perform the same duties in the City-County Building?

A. I only go over to the City-County Building for, to go to the law library on behalf of Judge Novak, although in my private practice I do appear in court in the City-County Building.

Q. What route do you normally take when you enter the courthouse to get to your courtroom?

A. Depends where I park my car. If I park in the Kaufman's parking lot, which I did most often—

[72] Q. If I may interrupt for a second, just starting with when you went to the courthouse, how do you get to the courtroom?

A. You go in through the, generally through the Grant Street entrance.

THE COURT: Why don't you just ask him, to perform his duties does he have to pass this particular location.

Q. Mr. Elbling, in the performance of your duties do you pass the location where the Nativity scene has been on display?

A. Yes, I do.

Q. On the average day about how many times do you pass that particular location?

A. Between four and six.

Q. Have you seen the Nativity scene?

A. Yes.

Q. On how many occasions?

A. Say between 30 and 35 times this year.

Q. Describe what you have seen.

A. The first, first time I saw it was after Thanksgiving, and there was a scene on the steps in the middle of the, I guess it's between the, on the landing between the first and second floors. There's a wooden stockade fence around the scene with some figurines, a Nativity scene. There was an alter-like structure on the back of that display.

Q. Could you take those stairs without detouring the around the Nativity scene?

[73] A. Well, you couldn't walk straight up the middle of the steps. You'd have to veer either to your right or your left, walk around it.

Q. Is the Nativity scene part of your religious heritage?

A. No. it isn't.

Q. Of what religion are you?

A. Jewish.

Q. How did you react to the display of the Nativity scene?

A. I was quite offended by the Nativity scene first time I saw it.

Q. Why is that?

A. It evoked in me a feeling that I was part of a minority and that the County was putting a stamp of approval on Christian religion, and particularly the holiday of Christmas.

Q. Can you get to work by your normal route without passing the Nativity scene?

A. By my normal route, no.

Q. Now, you testified that as to how you felt when you first saw the Nativity scene.

Did you feel any differently on the subsequent occasions that you were able to view it?

A. I guess I would say that I felt a little, every time I would pass it I would feel a little more offended. I looked at it more closely. One time I remember focusing in on the little figurine of Jesus, and it has an oversized type of head, [74] and figures are not to proportion, and that just evoked from me a memory of middle ages time when my people were persecuted and forced to live in guettos. You know, as a, as an American, as a tax paying citizen, I don't think that I have to be reminded of that as I walk into a public building.

Q. And that's the building that you work in?

A. That's correct.

Q. Going to show you what's already been offered as Plaintiffs' Exhibit 7, and ask you if that is, if you have

seen the sign which appears at the bottom of the picture when you've seen the Nativity scene?

A. Yes, I have seen that sign.

Q. What does that sign say?

A. It says, This display donated by the Holy Name Society.

Q. What meaning does that convey to you?

A. I took that to mean that it was a gift from the Holy Name Society, which I'm not familiar with, but I would assume it's a, by its name, probably a Catholic organization.

Q. Do you perceive the Nativity scene as a religious symbol?

A. Yes, I do.

Q. Going to show you what has been identified by an earlier witness as Plaintiffs' Exhibit 13 — this has not yet been offered into evidence — and ask you to explain what's in that picture.

A. This is also a picture of the Nativity scene. This one [75] is surrounded by, the scene is adorned by red and white poinsettias, and there's also a gentlemen walking across in front of that.

Q. Do you know who that gentleman is?

A. Yes, I do.

Q. Who is he?

A. I believe his name is Frank Williams.

Q. And do you know what he does in the courthouse?

A. I don't know his exact position there. However, I see him often sitting at a desk on a landing, I guess it would be to the right of the, as you're looking at the Nativity scene. I just know him from walking up and down the steps a lot when we greet each other.

Q. Do you know if he's an employee of the County?

A. I assumed that he is. I don't know for sure.

Q. And what leads you to that conclusion?

A. That he sits at a desk, and that there are often signs telling you to see Mr. Williams for information concerning various displays.

Q. Have you seen him at that normal post which you've described during the time that the Nativity scene has been on display?

A. I can't recall specifically seeing him there, no.

MR. PUSHINSKY: At this time I'd move to admit Plaintiffs' Exhibit 13 into evidence.

THE COURT: I assume no objection.

[76] MR. SPECTER: No objection.

MR. McTIERNAN: No objection.

THE COURT: We'll receive it.

May I see it, please.

Mr. Elbling, have you in the past seen the Menora which has been annually displayed outside of the City-County Building?

A. Yes, I have.

Q. What is your reaction to the display of the Menora?

A. Well, it's, I have a mixed reaction to that one. In one respect I'm proud as a Jewish person that the symbol of my religion is displayed. However, I get the impression by the placement of that Menora next to a Christmas tree of similar size that they are mainly to appease Jewish people, and I'm offended by the fact that people are trying to equate Christmas and Hanukkah. The holidays have nothing to do with each other, they merely happen to fall in approximately the same period of time.

Q. Does the presence of the Menora at the City-County Building in any way diminish the offense nature of the creche at the courthouse to you?

A. No, it doesn't.

Q. If the creche was placed next to the Nativity scene, would that diminish the offensive nature of the display? Strike that question.

If the Menora was placed next to the creche in the County [77] Courthouse, would that in any way diminish the offensive nature of the creche display?

A. No.

MR. PUSHINSKY: No further questions.

MR. McTIERNAN: Your Honor, just briefly.

CROSS EXAMINATION

BY MR. McTIERNAN:

Q. Mr. Elbling, you're an employee of the Allegheny County Common Pleas Court; is that correct?

A. Well, I'm a personal employee of Judge Novak. I'm on the County payroll.

Q. You receive your pay from the County.

And isn't it a fact that Christmas day is a holiday for all County employees?

A. That's correct.

Q. And I assume the same will be on this year, too, for Christmas day?

A. That's my understanding.

Q. Is that, in fact, somewhat of a recognition of the Christmas holiday in and of itself?

MR. PUSHINSKY: Objection, Your Honor; relevancy. The only two things at issue in this proceeding are whether the County may constitutionally display a Nativity scene inside the County Courthouse, and whether the City and/or the County may erect a Hanukkah Menora outside of the City-County Building.

[78] Whether or not—

THE COURT: I think the question is relevant to the general overall subject. I think the purpose of the question is to demonstrate that paying people on Christmas day and giving them the holiday time is probably a recognition of a holiday. We'll let him answer it, but I think the answer is obvious. I think we can take judicial notice of the fact, as well, that almost everybody in government gets a paid holiday on Christmas day.

MR. PUSHINSKY: Your Honor, if I may emphasize, it's not the recognition of the holiday by the government which is at issue in the present case, but whether the governing bodies inside the seat of government may display the sacred symbols of that holiday.

THE COURT: I understand, and we'll hear your arguments at the usual time. And I think I understand your argument.

MR. PUSHINSKY: Thank you, Your Honor. The record is clear.

BY MR. McTIERNAN:

Q. One final question, Mr. Elbling. A couple of previous questions you mentioned that you see Frank Williams when you go through the courthouse lobby; isn't that correct?

A. Correct.

Q. Isn't it correct, you see Mr. Williams at other times of [79] the year?

A. See him there all year round.

Q. He's there all year round; isn't he?

A. Yes.

If I may add to your other question, I work quite often on Christmas day.

Q. Are you required to work on Christmas day by the County of Allegheny?

A. I'm required by my position to get work done on a certain time frame. If it happens to be convenient for me to work on Christmas day, I do that.

Q. Thank you.

THE COURT: Well, I think we can take judicial notice of the fact many people work on Christmas day, depending upon whether they want to work or not.

Anything else?

MR. SPECTER: No questions.

MR. PUSHINSKY: Just a couple more, Your Honor.

REDIRECT EXAMINATION

BY MR. PUSHINSKY:

Q. On those occasions that you did see the Nativity scene, Mr. Elbling, that wasn't a Christmas day; was it?

A. No.

MR. PUSHINSKY: No further questions.

THE COURT: I guess we're through with you.

[80] MR. PUSHINSKY: Without objection from the Court, I'd like to authorize Mr. Elbling to leave.

THE COURT: Oh, yes, I think he can leave. You have no objection?

MR. SPECTER: No objection, Your Honor.

MR. McTIERNAN: No objection.

MS. LITMAN: Reverend Robert Brashear, Your Honor.

ROBERT L. BRASHEAR, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MS. LITMAN:

Q. Reverend, your name is Robert Brashear?

A. That's correct.

Q. And would you tell us, please, of what religious denomination are you a Reverend?

A. I'm an ordained Presbyterian Minister.

Q. I'm going to ask you about your schooling in just a few moments. but would you please tell the Court what is your present employment?

A. I'm presently the Executive Director of the South Hills Interfaith Ministry.

Q. South Hills Interfaith?

A. Ministry.

Q. Would you explain for us, please, what the South Hills Interfaith Ministry is?

[81] A. It's an organization that is made up of approximately 50 member groups of various congregations and denominations ranging from Roman Catholic to Presbyterian to Methodist to Jewish, Unitarian. We're involved in ministries of direct aid, meeting in terms of food, clothing, et cetera, psychological counseling, unemployment, work, and also groups to promote understanding between people of various faiths and ethnic groups.

For example, dialogue groups, Martin Luther King celebrations, et cetera.

Q. Can you tell me, Reverend Brashear, of what faiths or religions you are aware in Allegheny County in addition to those you have enumerated; that is, Christians, Jews, I think you said Unitarians. I don't know if that comes under Christians or not. But are you aware of the existence in Allegheny County of other religious groups?

A. First of all, the Unitarian congregation among our own ministry informs us they are neither Christian nor Jewish, but Unitarian.

I've also had occasion to meet various groups here, members of the Islamic and Hindu faith traditions.

Q. And in connection with that, would the Islamic — is that the same as Moslem?

A. Yes, it is.

Q. Are there mosques in Allegheny County?

[82] A. There are.

Q. And with respect to the Hindu religion, are there Hindu temples in Allegheny County?

A. At least one.

Q. All right. Now then, would you tell us, please, what was, what is your religious background and training.

A. As I said, I'm an ordained Minister of the Presbyterian Church, member of Pittsburgh Presbytery, was ordained in Eastern Oklahoma Presbytery in 1976.

Q. Where were you educated before that time, starting with your college education?

A. Went to college at the College of Worcester, and went on for my graduate work in Divinity School at Yale University.

Q. When did you graduate from Yale's Divinity School?

A. 1975.

Q. All right. Then, starting then in 1975, would you tell us what you did.

A. I served for approximately ten years as an Associate Pastor at the First Presbyterian Church in Tulsa, Oklahoma. Also served as Director of Urban Ministry for the Presbytery of Eastern Oklahoma, and came to Pittsburgh in April of 1985.

Q. And when did you become an ordained Presbyterian Minister, Reverend Brashear?

A. May, 1976.

Q. In order, incidentally, to become so ordained, must one [83] take and pass any examinations?

A. Yes.

Q. Would you just tell us briefly what those are?

A. The first of which is, is a Bible content exam. Then we're given a series of examinations, tests, both our knowledge of our own traditions and our capacity to work with that knowledge.

Q. Reverend Brashear, I show you photographs in evidence here which are marked as Plaintiffs' Exhibits 3 through 13, and I'd like to ask you if you will take a few moments to look at those.

Have you examined them?

A. I have.

Q. Those have been described in evidence as photographs of a Nativity scene which, in fact, is at the Allegheny County Courthouse. From your examination of them, can you, indeed, confirm that those are, in your view, a Nativity scene?

A. I would describe this as a traditional Nativity scene, yes.

Q. And can you tell me, Reverend Brashear, whether that traditional Nativity scene is a religious symbol?

A. From my tradition, it is a religious symbol.

Q. And can you tell us, please, when you say "from my tradition", of what tradition you speak?

A. Okay. First off, I would say that traditionally people in [84] the Protestant faith did not necessarily use these kinds of representations. They have certainly

become more popular with us. In my own church in Tulsa, Oklahoma we have the very large one. If you came to my office this week you'd find one in our own window. So from my tradition as a Christian, this is understood to be a representation of the birth of Christ.

Q. And when you say it's to be a representation of the birth of Christ, can you tell me from what that Nativity scene or representation comes; that is, from what is drawn those figures and that scene, and the manger and the people who are present in the Nativity scene, what is the source of it?

A. In these particular pictures you find something that falls directly in the tradition, is introduced by, St. Francis of Assisi originally used to teach illiterate persons of the story of the birth of Christ. This has been popularized among us. It takes two different traditions, one from the Gospel according the Matthew and one from the Gospel of Luke, and combines them into one representation.

The kings or magis that appear in the picture are from the Gospel according to Matthew. The shepherds are from Luke, as is the angel.

Q. We, we heard testimony this morning that referred to something called the, the incarnation. Does the word "incarnation" have some meaning to you, Reverend Brashear?

A. Obviously the only, the only importance Christmas has is [85] if one begins with the understanding of Jesus as Son of God.

In other words, when I teach courses on Advent, what I usually like to say is Christmas only makes sense if you first of all believe in Easter. Now, what that means, then, is

going back to this event, that what we have in this particular scene is that moment in time when God came to earth and took on human flesh. The word "incarnation" means, God becomining human. And that's what is represented in the Nativity scene.

Q. And when you say "this particular scene", you referred to the Plaintiffs' Exhibits 3 to 13, the photographs you have there before you?

A. Yes.

Q. Reverend Brashear, is there any secular symbol represented, is there any secular purpose presented by the Nativity scene?

A. The Christmas scene, as I stated earlier, particularly the ones of Jesus, Mary, Joseph, the angels, the kings, has no meaning outside of a faith tradition.

Q. That's the Christian faith or tradition?

A. Yes.

MS. LITMAN: Cross examine.

MR. SPECTER: No questions.

MR. McTIERNAN: No questions, Your Honor.

MS. LITMAN: Thank you.

Your Honor, the plaintiff calls Rabbi Mark Staitman.

[86] **MARK N. STAITMAN,** having been sworn, testified as follows:

DIRECT EXAMINATION

BY MS. LITMAN:

Q. Rabbi Staitman, would you repeat your full name for the Court, please.

A. Mark N. Staitman.

Q. And where do you, where are you presently employed, Rabbi Staitman?

A. I'm the Associate Rabbi of the Rodef Shalom Congregation, Fifth and Morewood, Pittsburgh, Pennsylvania.

Q. And for how long have you been so employed, Rabbi Staitman?

A. I've been a Rabbi at Rodef Shalom for 11 years.

Q. Would you please tell His Honor, and for the record, where and when you received your religious training, starting with when you went to college.

A. I was graduated from California State University in North Ridge in 1970. Concurrent with my studies there, I was an undergraduate student at the Hebrew Union College, Jewish Institute of Religion in Los Angeles. That is the reform seminary. I continued, beginning in August of 1970, as a graduate student at the Hebrew Union college. I spent one year in the campus in Jerusalem, three years in our school in Los Angeles, my final year in our school in Cincinnati, and was ordained by the Cincinnati School in June of 1975.

[87] Q. Now, when you say you were ordained, is there any particular qualification or type of ordination that a Jewish Rabbi receives?

A. There are three forms of ordination. Ordination for Rabbis is a, in a sense, form of licensure by the Jewish community. One permits one simply to teach. That is called the Yoreh-Yoreh — Y-o-r-e-h—Y-o-r-e-h. The second permits one solely to render legal decisions. That is called Yadin-Yadin — Y-a-d-i-n—Y-a-d-i-n.

The third is called Yoreh-Yadin, and it is a combination of the two. Permits one both to teach and to render legal decisions.

The ordination I have is the third type. It permits me both to teach and to give decisions in Jewish law.

Q. Now then, Rabbi Staitman, in past years in the City of Pittsburgh have you had the occasion to see at the City-County Building a Menora on the steps there?

A. Yes.

Q. And with respect to that Menora, is it what is known as a Hanukkah Menora?

A. Yes, it is.

Q. Would you please explain for the Court what is Hanukkah—C-h-a-n—Rabbi, can you give us your spelling, because it will be more accurate.

A. There are any number of them. H-a-n-u-k-k-a-h.

Q. Okay. What is Hanukkah?

[88] A. Hanukkah is the holiday that marks the rededication of the temple in Jerusalem following its recapture by the Maccabbees during the Hasmonean revolution. That was the revolution against the Seleucid empire, which began in 168 B.C.E.

Jerusalem was recaptured and the temple rededicated on the 25th day of the month of Kislev—K-i-s-l-e-v—in the year 164 B.C.E.

Q. Incidentally, when is Hanukkah going to start on the English calendar this year?

A. This year it begins on the 27th of December, but in the Jewish tradition all holidays begin on the evening before, because in our tradition the day itself begins in

the evening. So it would begin at sundown on the 26th.

Q. In the previous years that you have seen a Hanukkah Menora on the steps of the City-County Building, has it been approximately at the time the Hanukkah, that Hanukkah falls?

A. Yes.

Q. Now, having explained to us what Hanukkah is, would you please explain for the Court, what is a Hanukkah Menora?

A. In the Temple in Jerusalem there was a large room called the Holy of Holies. In front of that room there was a seven branch Menora that was to be kept burning continuously, and there was a rather elaborate ritual for cleaning that. It had to be cleaned and refilled with oil each evening. That was a symbol of the eternal presence of God in the Holy of [89] Holies. At the time that the temple was captured by the Seleucid, the Germans, the Menora was extinguished. When the Maccabees rededicated the temple it was necessary for them to relight that Menora.

There is a legend that there was insufficient oil for this to last beyond one day, there was but one cruse of oil, one container of oil, but miraculously this oil lasted eight days, which was the length of time that it took to get new oil so that the Menora could continue to burn.

The Menora that we use today is a symbol of that original Menora which stood before the Holy of Holies.

Q. Incidentally, I don't think the record yet shows, how many days in the Jewish religion does Hanukkah last?

A. Lasts for eight days.

Q. And this might be obvious, but is that because of the eight days that the oil lasted as you've described?

A. Yes, it's in keeping with the tradition of the miracle of the oil lasting for eight days.

Q. Rabbi Staitman, is a Hanukkah Menora, then, a religious symbol?

A. It is. And let me see if I can explain to you what we in the Jewish would refer to as the symbol.

Q. All right.

A. Judaism is different from Christianity. Christianity is a religion which is based on faith. Judaism is a religion [90] which is based on the performance of religious acts, which we refer to as mitzvot—M-i-t-z-v-o-t. Mitzvot are what we perceive to be divinely commanded acts. In our tradition there are 613 mitzvots, all of which come from the Torah, which are the first five books of the Bible.

Now, in addition to those 613 mitzvots, there are others which are ordained by the Rabbis, meaning the Rabbis during the period of the Talmud. The Talmud is a code of Jewish law codified in the sixth century. Any article used in the performance of a mitzvah, that's the singular of mitzvot—m-i-t-z-v-a-h—which is used voluntarily for the performance of the mitzvah, we see as in some way special.

For example, an Orthodox Jew wears an article of clothing which has four corners and ritual fringe, which are called tizit tizit — t-i-z-i-t — phonetic. Now, anyone who has children knows that when a child undresses he tends to throw his clothing, so one would expect a child upon taking off a sweater to simply throw it, or taking off a shirt, to throw it. That's not the case, however, with this garment.

It's treated with a special sense of sanctity, because it is the article by which a mitzvah is performed.

One can drink wine out of any container, but we in our tradition use a special container for drinking wine on the sabbath and holidays, a kiddush cup — k-i-d-d-u-s-h — and that's dealt with in a special way.

[91] And so, too, the Menora that we use for the lighting of the candles as Hanukkah. It's used solely for the performance of this Mitzvah.

Q. Is this act of lighting the Hanukkah Menora one of the Mitzvot that you have described?

A. It is one of the Mitzvot ordained by the Rabbis, as opposed to one contained in the Torah.

Now, the Menora, to take it one step beyond, one is not permitted to use the light from the Menora for the purpose of illumination. You're not permitted to read from that light. The Code of Law specifically precludes that. That is in order to show that the Menora is a symbol of the celebration of the miracle.

Q. And when you say "the miracle", you're referring to?

A. Well, that gets us into a bit of the theological debates.

Q. Without that, can we just say generally the miracle of the fact that the oil, instead of lasting the one day, lasted the eight; would that be over simplification?

A. Omar Maimonodes argues that it's the miracle of the success of the Maccabees over the Seleucids.

Q. In addition, then, to what you've explained to us, that the Hanukkah Menora is a religious symbol, due, did I understand your testimony correctly that the lighting of the Menora is, then, a religious act?

A. It is most definitely a religious act.

[92] MS. LITMAN: One moment.

Q. Rabbi Staitman, would it be correct to say that with respect to that miracle that you refer to, that the Hanukkah Menora and Hanukkah are symbols of, would it be fair to say that it's either divine intervention that made the Menora stay lit, or under the other theory, it's divine intervention that inspired the success of the Maccabees?

A. Yes.

MS. LITMAN: Cross examine.

CROSS EXAMINATION

BY MR. SPECTER:

Q. Rabbi Staitman, do I understand your testimony to be that the holiday of Hanukkah marks, in addition to the rededication of the temple, the actual recapture of that temple?

A. No. The holiday of Hanukkah is a holiday which is specific to the rededication of the temple. The word "Hanukkah" in Hebrew means to dedicate. So the holiday is specific to the rededication of the temple, but you could only have the rededication of the temple following its recapture from the Seleucids.

Q. So, you are saying that they are two independent events; one, the recapture, and two, the rededication, and that it is the rededication alone which is memorialized, so to speak, in the holiday of Hanukkah?

A. That's correct.

[93] Q. Is that, in your opinion, the belief of all branches of Judaism?

A. Well, here I would have to make a distinction between what formal theology says and what individuals say. In other words, there might well be members of my congregation who view Hanukkah differently from what reformed Judaism teaches of Hanukkah. Certainly all branches of Judaism, which is to say, reformed, conservative, orthodox and reconstructionist Judaism, on a theological level see Hanukkah as the celebration of the rededication of the temple in Jerusalem. There are also those Jews within the Jewish community who are non-theistic. I don't want to say atheistic, because I don't know whether they believe in God or they don't, but they base their celebration on the holidays on something other than religion, and they would see the celebration of Hanukkah as a cultural or national event, rather than as a specifically religious event. But I don't think that that represents, it certainly doesn't represent the four major religious branches of Judaism.

Q. But it does represent an independent thought, so to speak?

A. Surely.

Q. And it represents an independent thought within the Jewish community at large?

A. Whether that's a significant portion, I couldn't say, but it certainly exists.

Q. Going back for a moment to the Menora itself, Mrs. Litman, [94] in her direct examination, spoke of a Hanukkah Menora, and I, therefore, ask you, how does it differ from a plain Menora; that is, without the word "Hanukkah" preceding it?

A. All right. The Menora, the word "Menora" means candelabra. Within the Jewish tradition there are two

forms of candelabra which have a place in the tradition. One is a seven branch candelabrum, which is a direct representation of the candelabrum which existed both in the tabernacle built in the desert, and then in the temple in Jerusalem. The second is an eight branch, or now, as there is a tradition of using a separate candle to light the Hanukkah candles, now a nine branch candelabra, which is used specifically on Hanukkah, but has its basis as a symbol of the Menora which stood in front of the Holy of Holies in the temple in Jerusalem.

Q. So that the one that was in the temple in Jerusalem prior to its capture by the—

A. Seleucids.

Q. —Seleucids—thank you—was a seven holder candelabra?

A. That's correct.

Q. And there is an eight and nine candle holder?

A. The eight and nine are really the same thing. There are eight lights used for Hanukkah. There is a tradition, which is really a tradition of more African and European Jews, of adding a candle to the candelabrum for the purpose of lighting the eight candles which are obligatory. The ninth is, as it [95] were, a match.

THE COURT: Let me interfere a minute. I need all the education I can get, but it seems to me that we might be educated all afternoon here.

Can I assume for purposes of this case that the Menora is a religious symbol, although it also may be a cultural symbol? Because I think you gentlemen might talk together, and it's interesting and it's educational, but we have time constraints of some degree.

MR. SPECTER: I agree, Your Honor, and I certainly will say that I did not intend to protract this cross examination. However, I would be willing to agree that it is both a cultural and religious symbol, in part.

MS. LITMAN: Your Honor, it is our position, as I understand Rabbi Staitman's testimony, according to the vast majority, the greatest number of adherence to the Jewish religion, those people would take the view that is a religious symbol. It is only among a group that Rabbi Staitman referred to as some independents who might have some independent thought within the community that there is some notion that it is cultural, but it has no significance outside of the Jewish religion and belief. It is a religious symbol.

THE COURT: The Rabbi said that there are people who look at it as a cultural symbol, some who look at it as religious symbol, some who look at it as both. I suppose it [96] depends on the philosophy of the person looking.

MS. LITMAN: Of course, that's true, and naturally—

THE COURT: And I suppose that's true of the Nativity scene as well. People have different attitudes about what it means to them. But for purposes of our proceeding here today, could we agree that it's a religious symbol to some and a cultural symbol to others?

MS. LITMAN: Only, Your Honor, I could agree if we talk a cultural symbol, a Jewish cultural symbol. It has no other meaning.

THE COURT: Yes.

MS. LITMAN: And the others would not be a significant proportion, as I understand the Rabbi's testimony of even the Jewish community. But it would only be that it's a Jewish religious symbol.

THE COURT: I don't want to interfere with Mr. Specter's cross examination. It's not good for a Judge to interfere with cross examination. I'm simply seeking some concensus. But go ahead, and I'll try to keep quiet.

MR. SPECTER: Okay. And I'll try to move quickly, Your Honor.

Q. Rabbi Staitman, is the Menora, Hanukkah or otherwise, an object of worship?

A. Judaism has no objects of worship. We consider objects of worship to be heretical.

[97] Q. Would you say it is a symbol of a type which would symbolize a religion?

A. Unquestionably.

Q. Could you compare it to any symbol commonly used in any aspect of the Christian religion?

A. Well, I think that it is comparable to a creche in the following sense. The creche is a symbol of what Christianity believes to be the miracle worked by God, his appearance on earth in human form. The Menora is a symbol to the Jewish people of the miracle worked by God in either the recapture and dedication of the temple, or the oil lasting for eight days. So in that sense I think they are comparable symbols, that they both represent what we perceive to be miracles.

Q. Could the lighting of the candles be carried out and the tradition properly followed if the candles were not placed in a Menora?

A. They can be.

Q. In other words, they could be, if something would hold them up they could sit on this bench right here?

A. Yes, they could.

Q. And the lighting of them would constitute proper observance of the holiday?

A. No, it would not constitute proper observance.

Q. Why is that?

A. The candles must be placed such that they are visible to [98] the general public, as a proclamation to the public of the miracle, and therefore, the Menora traditionally is placed outside the door as you face the door to the left-hand side. Now, if one lives in a domicile such that you can't do that, then the tradition is to place the Menora in a window, such that it can be seen by the general public.

Q. You have testified, I believe, in essence, if not in fact, that the lighting of the candle is a religious act?

A. That's correct.

Q. Would it be a religious act if it were not lit by a Jewish person?

A. It has no status whatsoever. Let me explain what I mean. To fulfill a mitzvah is what we mean by religious act. In other words, to do that which we perceive to be divinely required. It is not a devine requirement for a non-Jew to light the Hanukkah Menora. Therefore, it's not seen as a religious act if a non-Jew does it. It is obligatory for Jews to do it. I don't know if that answers your question.

Q. Yes, I think it does.

Have you personally viewed the Menora in past years which has been displayed on the steps of the City-County Building?

A. I have.

Q. Do you know by whom the candles over the years have been lit?

A. I do not.

[99] Q. But your testimony would be that if they were lit by non-Jews, that such lighting would not constitute religious acts?

A. That is correct.

MR. SPECTER: I have no further questions.

MR. McTIERNAN: No questions, Your Honor.

THE COURT: Any redirect?

MS. LITMAN: Just a couple of questions, Rabbi Staitman.

REDIRECT EXAMINATION

BY MS. LITMAN:

Q. One, have you ever heard of Hanukkah being declared a general secular holiday in the United States?

A. No.

Q. If Jewish people wanted to see a Hanukkah Menora, can you tell me whether they would have, are there Hanukkah Menoras available to them outside of the one that's on the City-County Building?

A. Yes. There are at least three which are lit, four which are lit publically. One stands on top of the Yeshiva Achei Tmimim and is visible from the Parkway. One stands in front of the Nahama Minsky school for girls and is visible at the corner of Wightman and, I believe, Hobart. One stands in front of the Temple Sinai, which is on Forbes Avenue, and there is one in front of the Hebrew Institute also on Forbes Avenue.

Q. And in addition to those, are there Menoras available, and, [100] in fact, used, to your knowledge, by Jewish people in their homes in the Hanukkah season?

A. Yes.

MS. LITMAN: No further questions.

MR. SPECTER: No further quesitons.

MR. JANOCSKO: No questions.

MR. LITMAN: May I have just a moment, Your Honor.

THE COURT: I think that sunlight is bothering some of the people, Mr. Finkelstein. Would you have Mr. Duffy close the blinds up there.

MS. LITMAN: Your Honor, the plaintiff rests.

Oh, I'm sorry, if I may, Your Honor, there is one further thing, if I may. I spoke too quickly.

I would like to merely state, for the record, an admission which comes by way of a subpoena directed to each the defendants, and their response to the subpoena. A subpoena was directed to and served upon the County of Allegheny, demanding that certain documents be brought, to-wit: All records regarding the erection, storage and maintenance of the Nativity scene now on display at the County Courthouse, and the defendant, through its counsel, has advised me there are none.

Similarly, Your Honor, a subpoena was directed to the City of Pittsburgh, and it demanded that the following documents be produced: All records regarding the erection, storage and maintenance of the Menora displayed December 18, 1985 in or [101] about the City-County Building. And similarly, the City has responded, there are none.

Now the plaintiff rests, Your Honor.

THE COURT: All right. We'll mark the testimony closed for the City, or rather, from the plaintiff.

Now, you gentlemen wish to call anyone? Mr. Specter.

MR. SPECTER: Your Honor, at this time we respectfully move the Court to deny plaintiff's motion for a preliminary injunction and/or application for restraining order. And if the Court please, although this has not been the subject of prior discussion, it seems to me that under the circumstances, prior notice having been given, et cetera, that under the rules and applicable law, this is probably a hearing, a plaintiff's motion for preliminary injunction, although I don't know it makes much difference insofar as the law is concerned.

THE COURT: This is hearing on motion for preliminary injunction. The record shows that I made an order that we would hear the motion for preliminary injunction today. Both sides are represented. Testimony has been heard. So, I treat it as a motion for a preliminary injunction.

MR. SPECTER: Okay, Thank you, Your Honor.

It appears to the City that under applicable law the plaintiffs have not satisfied the burden necessary to mandate issuance of a preliminary injunction. Does Your Honor want to hear some argument, or how—

[102] THE COURT: Well, lets see what the County wants to do here. I take it this would be a motion that you would make in the nature of a motion for directed verdict on the grounds you have not heard enough evidence introduced to create the violation of the Establishment Clause; is that your theory?

MR. SPECTER: That is correct, Your Honor.

MR. McTIERNAN: I would join—

THE COURT: I deny your motion. You could still introduce testimony.

MR. SPECTER: That is correct.

THE COURT: What is your position.

MR. McTIERNAN: At this time we join in the City's motion to dismiss under the rules for directed verdict. That was the understanding. We do have witnesses.

THE COURT: You gentlemen have testimony, in the event that I deny your motions?

MR. McTIERNAN: Yes, Your Honor.

MR. SPECTER: Frankly, I've not yet decided, Your Honor. I do have witnesses present, but I have not determined whether to call them.

THE COURT: Well, I understand the nature of your argument. I'll let you argue briefly whatever you want to put on the record here.

MR. SPECTER: I promise it will be very brief, Your Honor.

[103] Plaintiffs are required to make a clear, I emphasize the record, clear showing to their right to a preliminary injunction. Among the facts in law taken into consideration in, by the Court in determining whether to so exercise its discretion is, No. 1, whether there are any facts in dispute. And we respectfully submit that there are substantial facts in dispute. By way of example, there has been substantial testimony indicating that the display of the City includes not just the Menora, but in fact, includes a Christmas tree, which is not the subject of any dispute in this case, and to my knowledge, is not, has not been the subject of dispute in any of the recent Supreme Court's or Circuit cases addressing this issue generally. So, we have in the case of the City a general seasonal display, which as I

will indicate very briefly, has been consistently upheld by the Federal Courts within the last few years as this question has come more and more to the floor. We know that there are factors for which two of which are mainly significant here which lead the Court to determine whether a preliminary injunction ought to issue. One, of course, is the significance of the threat of irreparable harm, if, in fact, there is irreparable harm to the plaintiffs if the injunction is not granted.

I point out to the Court that in the case of the Menora, it has been placed in its location in the front of the City-County Building each season for approximately five years. I [104] do not know how long the creche has been present in the County Courthouse, and that's not my part of the argument. But in any event, these displays have been long existent, and I suggest five years is a sufficient amount of time to which the word "long" may be applied. There has been no litigation, no public complaints, other than the complaints to which Miss Doyle testified regarding the Menora in this five year period. If fact, if you will recall her testimony on cross examination, she admitted that, in fact, this proposed lawsuit had been under consideration for approximately one year. It was at a Board meeting of the ACLU in October of this year that the Board determined that it would consider, and at that time approve the institution of this suit. Nevertheless, it was not until November 13th of this year Mrs. Doyle wrote to Mayor Caliguiri and asked that the Menora not be placed in front of the City-County Building. Five days later, by letter of November 18th, the Mayor responded to her. We may assume she had his response, the mails being what they are, probably by the 19th or 20th of November. Despite that, this suit was not instituted until, I believe, December 10th, and was probably served upon us late, not probably, but in fact, was served upon us by hand delivery last Wednesday, very late in the day, I would say, approximately 5 o'clock. Two days

later we were served with a summons, the traditional summons, which advises us we have 20 days in which to answer it. I will [105] tell the Court that the application for temporary restraining order and the motion for preliminary injunction were served concurrently last Wednesday evening with the complaint. Nonetheless, the import of all this is that a substantial amount of time has gone by, and we draw closer and closer to the time when the Menora would traditionally be erected. The essence of this is there has been delay, and when there is substantial delay there comes into question laches, and where, in fact, under the circumstances a preliminary injunction, one of the most predominant cases in the law ought to be exercised.

Now, what are the others. There are several, but one of the most important is there must be a reasonable probability that the plaintiffs will succeed on the merits. I respectfully suggest to the Court that the plaintiffs having rested, that reasonably, probably has not been substantially evidenced, if at all. No one, including I, has discussed the applicable law in this case, and as I promised the Court, I would not be protracted, but will only point out that there is, or was, two years ago, the case of Lynch v. Donnelly, which held that a creche in the context of the overall Christmas season, surrounded in a public forum by other indicia of Christmas, such as toys and Christmas trees and Santa Claus figures, et cetera, was appropriate. Circuit courts have held the same. Under the circumstances, and under all of the facts adduced [106] by plaintiff, and taking into consideration such admissions which may have been made in cross examination, we suggest that there is not a reasonable probability that they will succeed on the merits, and therefore, that at this point the Court should deny the application.

Thank you.

THE COURT: I suppose you adopt the same argument for the County?

MR. McTIERNAN: Yes, Your Honor.

MR. PUSHINSKY: Does Your Honor care for a response?

THE COURT: I don't think it will be necessary, because I'm going to deny the motion for dismissal at this time. I think we ought to hear the witnesses that these gentlemen wish to call, at least briefly.

Let's take a five-minute recess, and then we'll complete the record.

(Court recessed at 3:15 o'clock p.m.)

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(Court reconvened at 3:26 o'clock p.m.)

THE COURT: All right. Let's come to order, ladies and gentlemen. Let's let the defendants here proceed in any order that they wish.

Who would like to proceed first?

MR. McTIERNAN: We'll begin first, Your Honor, Allegheny County.

[107] Mr. Thomas.

MS. LITMAN: If the Court please, the plaintiffs request an offer of proof at sidebar.

THE COURT: All right.

(Sidebar conference was held on the record:)

MR. McTIERNAN: Your Honor, Mr. Thomas will testify he's the Director of Communications for Allegheny County, that for approximately 18 years he's made the

Christmas carole program, that the Nativity scene is part of the Christmas program that he plans, and he's familiar with the circumstances, you know, surrounding the Nativity scene, and basically state the County doesn't own the Nativity scene and various, he'll explain the circumstances of how it's erected, how it comes to be there, and he will basically explain about the courthouse area and how this particular area is used for a great number of ceremonies and other cultural events, and basically put the Nativity scene in the context of a holiday celebration, along with other aspects, such as high school choirs and things of that nature.

MS. LITMAN: Your Honor, two things I'd like to ask. Counsel says the witness will testify to the circumstances surrounding the display, the erection of the Nativity scene, but I didn't hear him say what those were that the witness is going to testify.

MR. McTIERNAN: Do I need to go into detail?

[108] THE COURT: All right. We'll let him testify. I assume you don't object?

MS. LITMAN: The other thing is, with respect to the fact that the courthouse area is used for a great number of other events. Your Honor, I don't think that's relevant to anything involved here. I'd like to know on what issue the County offers that, because it appears to me not to be relevant.

MR. McTIERNAN: It will be very brief. In the Scarsdale case, in the Second Circuit, it appeared to be important to the Court there was access by a number of community groups to the area involved. We don't feel that that's under the Lynch case.

THE COURT: I think it lays the groundwork for an argument that the courthouse is used repeatedly for activities of various kinds. I don't know that it's relevant either, but we'll let him talk.

MS. LITMAN: Thank you, Your Honor.

(Sidebar conference was concluded.)

GEORGE N. THOMAS, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. McTIERNAN:

Q. Mr. Thomas, will you state your full name for the Court.

A. George N. Thomas.

Q. And your business address?

[109] A. 409-A County Courthouse, Department of Communications.

Q. How are you employed, Mr. Thomas?

A. I'm Director of Department of Communications.

Q. How long have you held that position?

A. 18 and a half years.

Q. Could you state briefly for the Court your educational background, and what your duties are as Public Director for the County.

A. Graduate degree from Waynesburg College, a Graduate degree in communications. My duties as Director of Communications, which was formerly called Public Information, is we are the conduit between the County government and the public, through the news

media with whom we deal every day. We prepare proclamations, resolutions, we write news releases, take photographs, cut lines for distribution. We prepare ceremonies, dedications, ground breakings of all sorts and so forth. General public relations work.

Q. And your capacity as Director of Public Relations, are you familiar with the area known as the courthouse forum and grand staircase?

A. Yes, I am.

Q. Could you explain briefly to the Court where that is in the courthouse and what it is?

A. It's on the first floor of the courthouse, which used to be the main entrance to the courthouse before they cut down [110] Grant Hill. That used to be the main entrance to the courthouse. It is now the first floor, and you have to take an elevator or steps to get there. It is the, it is the main, main most beautiful part of the courthouse, I would say. It's called the grand staircase.

Q. Do you have any involvement in planning any Christmas ceremonies for the forum, in particular, the grand staircase area?

A. Yes.

Q. What are the nature of these ceremonies or celebrations?

A. Well, annually since 1968 when I first joined the County government it has been my department's responsibility to plan and schedule the events taking place there two or three weeks prior to Christmas.

Q. What exactly are those, Mr. Thomas?

A. We begin in September by arranging for choirs to come and sing. We, we have, we generally, it becomes

kind of traditional that the director of the choir at Quaker Valley High School, because of his knowledge of the best choirs in the County among high schools, would invite certain schools to come, and from there it grew into community groups. We now have the senior citizens and girls scouts and various groups. Most of them are, however, high school choirs.

Q. How often do they perform, Mr. Thomas?

A. They perform daily during the weekdays, during the lunch [111] hour. Sometimes some days we have one choir, sometimes we have two, because of the demand, the popularity the program has drawn. We started off in 1968 with about six or seven choirs. Now we have them, we have to schedule double headers, so to speak, because so many of them want to come and sing on the grand staircase and have their picture taken.

Q. Is the staircase the only program that the choral program has, groups program?

A. That's right. We lack the rotunda area, like the City-County Building. It's the one place, it's the most beautiful place in the courthouse, with all the arches and so forth, and it is the most public place to do it.

Q. You're talking about the courthouse now?

A. The courthouse.

Q. Is there any place else in the County that these choirs perform?

A. They also perform at the Greater Pittsburgh Airport. Many of them sing at the courthouse first, and then go to Greater Pitt and sing in the rotunda of Greater Pittsburgh Airport.

Q. Has your department prepared a schedule for the 1986 Christmas?

A. Yes, we did.

Q. I have a document that's been marked as Defendants' Exhibit No. 2. Could you identify that for the record.

[112] A. Yes. Yes, this is our schedule for 1986, beginning with December 3rd, and culminating on December 23rd, with the St. Raphael Elementary School band, from whom Father, whatever, I forgot the Father's name, it's his elementary school band that is performing on the 23rd.

Q. There appear to be two sheets in the exhibit.

A. That's right. The first sheet is the courthouse schedule and the second one is Greater Pitt Airport.

Q. So, the first sheet would indicate the groups that are performing there on a day to day basis?

A. That's right.

Q. At the courthouse grand steps; okay. Does your department issue any press release with respect to the choral program and its purpose?

A. Yes, we do.

Q. Did you issue one?

A. Usually Thanksgiving week we announce the schedule for both the airport and the courthouse.

Q. Let me show you an exhibit that's been marked Defendants' Exhibit No. 3, Mr. Thomas. Are you familiar with that?

A. That's right. It's the news release we issued to the news media on November 20th.

Q. Is that the exhibit that you released for this year's program?

A. That's right. Every consecutive year—

[113] Q. Does the press release discuss the purpose for the program?

MS. LITMAN: Before the witness testified as to the press release, may I have a moment to read it?

THE COURT: All right.

MS. LITMAN: Thank you.

THE COURT: We all set to go ahead?

MS. LITMAN: I just need one moment, Your Honor. I'm sorry. Go ahead, Your Honor. I can't find it.

Q. Mr. Thomas, has the choral program been dedicated to any religious or secutarian purpose this year?

A. No, sir. It's always been dedicated to world peace, brotherhood, and to the prisoners of war, or the men missing in action and their families.

Q. And is that reflected in the press release that you've issued?

A. Yes, it is. And we always ask the Minister who's going to give the invocation to dedicate it to the families of the prisoners of war and men missing in action.

Q. Just briefly, why is the grand staircase chosen for this particular program, Mr. Thomas? I think you referred to it previously.

A. It's the most beautiful part of the courthouse, with its arches and stairway, grand stairway.

Q. In addition to the arches and the stairway itself, what's [114] the setting for the choral program?

A. When?

Q. Where the choirs will stand, or, you know, is there any decoration or any setting that's prepared for the choral groups to use?

A. By us, or by someone else?

Q. Well, generally, what is it, not what you necessarily do, but what is it generally?

A. There's usually a Nativity scene, then there are Christmas trees, evergreens with red ribbons, poinsettias of both red and white, various, various other decorations, all cultural programs department, which is to add.

Q. I have a series of photographs marked as Defendants' Exhibits 4 through 7, Mr. Thomas.

MS. LITMAN: Can you just give me a moment.

THE COURT: We better mark yours A through whatever letter is that you come to the end on, because the plaintiffs are numbered; aren't they?

MS. LITMAN: Yes, Your Honor.

THE COURT: So, let's call this, A, B, C, D, E, F, G.

MR. McTIERNAN: You want to renumber the entire set, Your Honor?

THE COURT: You don't need to renumber the entire set. That's just what we'll refer to them as. You can renumber [115] them later.

MR. McTIERNAN: Okay.

Q. Do you know how these photographs came into existence, Mr. Thomas, when they were taken, or who took them?

A. Yes. They were taken Friday afternoon.

Q. And who directed them to be taken?

A. By County photographer.

Q. Okay. Could you explain briefly what each photograph depicts?

A. Sure. This one—well, let's take, well, this one, this one first.

Q. Sure.

MS. LITMAN: That's A?

MR. McTIERNAN: Call that 4A, A. We'll refer to the first photograph as D.

Q. Could you explain what D is, Mr. Thomas?

A. D shows a medium closeup of the manger scene with the green, green trees in the background there, poinsettias surrounding it, a wreath on the back on the window in the back, and a fence around the entire scene.

Q. Could you explain what Exhibit E represents?

A. This one is taken from behind on the top step looking down onto the setting, the grand staircase, from the top.

Q. Okay. Are there any other Christmas decorations that were—

[116] A. Yes. There are several trees along the window there, under the large painting. There are poinsettias, throughout there there's the American flag in the corner. More trees, from this angle you can see more evergreens than anything else.

Q. That was the photograph that's been marked, then, Defendants' Exhibit E.

A. This one here shows, if you were standing in front of the grand staircase and look to your right you could see the current art exhibit that is off to the right, as also part of the grand staircase.

Q. Could you explain what that exhibit area is, briefly, Mr. Thomas?

A. It's called the gallery forum, and throughout the year our Cultural Programs Department arranges for various art displays. And they are, they're completely in charge of that. We have nothing to do with that.

Q. Is that in the courthouse area there?

A. Same branch, grand staircase area, it's called. And this picture here shows looking to the—

Q. The one you're referring to now is the photograph marked G?

A. G, you're looking to the left, the rest of the art exhibit.

Q. So in looking at those photographs, Mr. Thomas, do they depict Christmas decorations and art exhibits, in addition to [117] the Nativity scene?

A. Yes, they sure do.

Q. Who owns the Nativity—

MS. LITMAN: Excuse me, Your Honor. I'm not clear on whether or not there's more than a D, E and F. Has there also been a G marked?

MR. McTIERNAN: The last one referred to by Mr. Thomas was, I believe, G.

MS. LITMAN: Is that this one? I just want to be sure mine are the same as yours.

MR. McTIERNAN: Yes.

Q. Who owns the Nativity scene, Mr. Thomas?

A. The Holy Name Society of the diocese of Pittsburgh.

Q. And how long has this particular Nativity scene been used as part of the choral program?

A. Since 1981.

Q. Is there any sign in front of the Nativity scene?

A. Yes.

Q. And what does the sign say?

A. "This display donated by the Holy Name Society."

Q. Who provided that sign?

A. Father Paul Yurko of the, he is head of the Holy Name Society, and he also has a church in Ambridge. I think it's called Holy Redeemer Church.

Q. So, the sign and the Nativity scene are owned by the Holy [118] Name Society; is that correct?

A. Yes.

Q. Could you just tell us briefly what the manger display consists of?

A. It's a typical Nativity scene. There is the, there's the manger, and then there's Jesus and his mother, Mary, Joseph, the shepherds, little, little sheep, the wise men, a typical Nativity scene.

Q. And have you taken any steps to measure the size of it just for the information of the Court?

A. Yeah. The little sheep are just about three or four inches high. The tallest one is about 15 inches, one of the wise men. The rest are in between.

Q. Does Allegheny County provide any special utilities or illumination for the Nativity scene?

A. No, we did not.

Q. And does the County spend any funds for the maintenance of the Nativity scene?

A. No, we do not.

Q. Has the County had any role in storing it during the past year?

A. The last year, last two years Father Yurko asked me if we had space in the basement where we could store it, inasmuch as he was bringing it in in a station wagon, and he said it bounces around, and these are plastic figurines. He said they [119] may break. Do you have some place where you can keep them from year to year. So, I have a storage room in the basement of the courthouse, and I found a corner there not being used for anything else, so I just, I just place them there for him, and then he comes back the following December, and I give them back to him.

Q. Who's responsible for erecting and disassembling the Nativity scene each year?

A. Father Yurko insists on doing it alone. He brings straw with him, and I simply borrow a dolly. I go down to the storage room, we place the figurines on the dolly, we take it up in the elevator, and then I leave him. He does everything himself.

Q. Does anyone else handle the figurines or arrange the figures?

A. He won't let us.

Q. He insists on handling it himself?

A. Yes.

Q. To your knowledge, has the County or any County employee ever been involved in any way in erecting or disassembling the scene. You mention you haul it out on a dolly. Do you know of anything else that has or might have occurred?

A. No. Once I leave him there with everything I go back up. When I come back down later it's all set up. He does it all himself.

Q To your knowledge, Mr. Thomas, has the County ever incurred [120] any direct expense in the erection or disassembling?

MS. LITMAN: If the Court please, that's objected to. This witness is an employee of the County. His salary is a direct expense. The building is owned and maintained by the County. That's a direct expense. The storage area is now admittedly owned by the County. That's a direct expense. So, for this witness to opine something contrary to that, I think would be improper. I don't think he's competent to testify to that.

THE COURT: Well, we'll let him answer the question. You can argue that there are expenses involved, but I think he's entitled to state what the expenses are, if any, and then you can cross examine him on his knowledge. He's certainly capable of telling us what he does, and I suppose from that I can infer what the expenses are, if any.

Go ahead.

Q. You can answer, Mr. Thomas.

A. I, there's no out of pocket expenses, none.

Q. Is there any County employees stationed in the area of the courthouse forum?

A. Yes. Frank Williams is there.

Q. Okay. And is he assigned there simply to watch the Nativity scene, Mr. Thomas?

A. No, sir. He's there year round. He's part of the Cultural Programs Department, and he's there to guard the exhibits [121] the art exhibits.

Q. So, there are art exhibits there all year around?

A. All year round.

Q. Would he continue to be employed even if there is no Nativity scene?

A. Oh, yes. He's there year round.

Q. Just briefly, Mr. Thomas, are there any other Christmas decorations in addition to the Nativity scene that make up the setting for the choral programs?

A. We have loud speakers that broadcast the music of the choral groups out into the street, because our area size is so limited. There are decorations, you know, throughout the courthouse. Every department has wreaths, trees, Santa Clauses, and what have you, all sorts of decoration.

Q. Would that include the first floor of the courthouse where the staircase is located?

A. Well, throughout the first floor is, beyond the grand staircase, down the hallways, outside we have a banner that invites people to come in and hear the choral groups.

Q. Okay. Let me show you this Exhibit which is being marked Defendants' Exhibit H. You just made a reference to a banner. Could you identify that?

A. Yes. Yes, the banner—

MS. LITMAN: Excuse me, excuse me—

MR. McTIERNAN: I don't have an extra one.

[122] MS. LITMAN: May I see this one before the witness testifies, Your Honor?

THE COURT: Oh, I guess so.

Q. You were saying, Mr. Thomas?

A. Yes, this is the typical banner. We use the same, same design every year. We simply change the date, and this is an annual, we put the dates and the times, and we invite the people to come in to say happy holidays from the Christmas carol program, grand staircase.

Q. Was essentially this banner put up this year?

A. Yes, it, it was up for two weeks.

Q. Is it up right now, Mr. Thomas?

A. No, it isn't. It was taken down last week.

Q. Was it taken down deliberately?

A. No, it was taken down in error. It was supposed to stay up 'til Christmas, but was taken down prematurely.

Q. Did the County ever have any other Christmas displays on the courthouse steps in addition to the Nativity scene?

A. Yes, we used to have a live 20 foot spruce Christmas tree on the top landing of the grand staircase, until 1981, when the City Fire Department called it a hazard, fire hazard, and made us remove it. Well, they didn't make us remove it, but they said, don't put it up next year. And we then, we then turned to other decorations.

Q. So, originally had a Christmas tree in addition, but [123] you took that down out of necessity because of the fire regulations?

A. That's right.

Q. Okay. In speaking of the choral groups, again, just briefly, Mr. Thomas, does the County have any role in determining what songs the choral groups sing?

A. No, we do not.

Q. Do you know whether, to your knowledge, any of these choral groups sing any carols of a religious nature?

A. Yes, and nonreligious.

Q. There's a combination of traditional?

A. Yes, they bring their own program. We don't designate what songs or carols they are to sing or not sing.

Q. Do you take any steps to publicize the participation of various choral groups, high school groups in the choral program?

A. After they, the day they appear, we take their picture and send it to the local papers with a brief headline saying they participated in this year's Christmas carol program, and the fact that the program is dedicated to world peace and brotherhood, and the families of the P.O.W.'s and M.I.A.'s.

Q. Okay. Let me show you an exhibit marked Defendants' Exhibit I.

MS. LITMAN: Excuse me, Mr. McTiernan, this?

MR. McTIERNAN: Yes. Mark it, please.

Q.. What does it consist of?

[124] THE COURT: Well, this is the one you're showing the witness?

MR. McTIERNAN: Yes, Your Honor.

THE COURT: I just wondered whether that was so I could look at it while you were questioning the witness about I.

MR. McTIERNAN: I'll give it to you in a second, Your Honor.

THE COURT: Take your time.

Q. Could you identify that and explain what it is, Mr. Thomas?

A. Yes. This is a photo taken on December 4th of the 55 member North Allegheny High School choir, and they, they were the, I guess the second group to sing this year.

Q. And would that be a fairly typical—

A. Yes.

Q. This a typical presentation.

Let me show you another similar exhibit which has been marked J. Would you identify that please.

A. This is the North Allegheny string ensemble under the direction of Joe Feich, and they appeared December 5th the, following day.

Q. And the two exhibits you've just discussed, do they show the Nativity scene as a setting for the choral group?

A. Well, you couldn't see it here, but the orchestra—

MS. LITMAN: Excuse me, if the Court please, these [125] exhibits are not in evidence, so I don't think it's

appropriate to ask the witness to testify as to what they show.

MR. McTIERNAN: Your Honor—

THE COURT: You better move them.

MR. McTIERNAN: Your Honor, I move at this time admission of Exhibits A through J, all the exhibits identified by Mr. Thomas.

MS. LITMAN: All right. We have objection to a number of them, Your Honor. So, may I get them in order and offer the appropriate objections?

THE COURT: Well, which ones do you object to?

MS. LITMAN: I'd like to be sure that I have the correct ones, so if I could be, if I could ask counsel to show me the ones that he—

THE COURT: Here you go.

MS. LITMAN: I'll just mark mine, Your Honor, and then I'll pass them up so the Court can see the ones. Counsel has run through them very quickly, so that's why—I guess I need I. Okay. Let me give you those two. Now, what number is this one?

MR. McTIERNAN: Is that the press release?

MS. LITMAN: That's one of the press releases.

MR. McTIERNAN: That would be Exhibit C.

MS. LITMAN: The press release, Exhibit C.

MR. McTIERNAN: That's the Exhibit C, the first press [126] release.

MS. LITMAN: Let me get the photographs coordinated. Could I see D? This is D.

MR. McTIERNAN: That's right, that's D. That's E.

MS. LITMAN: Sorry, Your Honor, but when they were handed to me they weren't marked, so I just want to make sure they are coordinated.

MR. McTIERNAN: The offer is A through J. A was already admitted, then B through J.

THE COURT: Here you go. Maybe I'm holding one up here that you need.

MS. LITMAN: B and C. May I go through these one by one, Your Honor. Plaintiffs object to Defendants' Exhibit B, the Allegheny County Christmas carol program, because we think it has no relevance to the question of whether the display of the Nativity scene on the grand staircase violates the Establishment Clause. And we point out that the exhibit itself shows clearly that for the great majority of the time the creche stands certainly not accompanied by anything referred to on the items here. The record shows that the Nativity scene was put up on November 26th. This schedule doesn't even start until December 3rd. And indeed, when it does start it recites a program that takes place an hour or two a day. So we would object to B on the grounds of relevance.

[127] THE COURT: All right. We'll overrule the objection and receive B.

Next objection.

MS. LITMAN: With respect to C, Your Honor, we object that this is a hearsay statement. It has no relevance to the Nativity scene, and we would object to the hearsay aspects of it being put into evidence. The fact that there are, indeed, public relations directives sent out to the public has been attested to by the witness, and we think that the contents of this, if the defendant wishes to use it to attempt to argue what Commissioners Foerster, Flaherty

and Haver say or urge, or intend, or what their purpose is, is clearly hearsay for that purpose. So, we would object to C if it is offered for any substantive purpose other than that there was a release issued, but not for the contents of the release.

THE COURT: All right. We'll overrule the objection and receive C.

Any other objections?

MS. LITMAN: Yes, Your Honor.

There is no objection to Defendants' Exhibit D, or E, or F, or G, since we believe that those are relevant.

Where is Exhibit H?

THE COURT: Right here.

MS. LITMAN: I'm sorry, Your Honor, I don't—

THE COURT: Exhibit H is the one that has the banner [128] across the courthouse front that says, welcome to the 18th annual Christmas carol program.

MS. LITMAN: Your Honor, we would object to Exhibit H on two grounds. One, it is not visible where the Nativity scene is displayed, and indeed, the witness has testified that it is not even there at the present time. So we don't think it's relevant to the issues before the Court.

THE COURT: All right. We'll overrule the objection and receive H.

Any other objection?

MS. LITMAN: Yes, Your Honor. With respect to J and I, there seems no purpose to attaching to each of these photographs the news releases which counsel has attached, except for the purpose of attempting to admit hearsay statements into the record. So that with respect to Exhibit

I, the photograph might be argued to have some relevance, we would argue that the carolers are not relevant, but in view of the Court's ruling as to the caroling program, I can see that the Court believes that the carolers are relevant, but the first page, that is the hearsay statements contained on the first page, seems merely an attempt to get into evidence heresay declarations. And the same thing is true with respect to J.

So with respect to those, in addition to the relevance argument as to the photographs, the—

[129] THE COURT: I take it you are objecting to I and J?

MS. LITMAN: The relevance of the photographs, but the, in addition, Your Honor, the first page which is clipped on, which is a hearsay declaration, I object to on the grounds of hearsay.

THE COURT: Those are the news releases of December 4th and December 5th.

MS. LITMAN: That's right. As to those, I offer the competency objection.

THE COURT: We'll overrule the objection and receive it. They are all received.

Now, you can proceed.

BY MR. McTIERNAN:

Q. Mr. Thomas, do you regard the Nativity scene and the Christmas trees and poinsettias in the area as part of the choral program?

A. Yes, I do, as part of the entire Christmas season culture.

Q. What is the purpose of the choral program?

A. It reflects the season of the year, happiness, good will toward men, and so forth, and the fact that we remember, and the Commissioners remind me every year, remember to dedicate it to the families of the prisoners of war and the men still missing in action, and specifically supposed to be a good will program for all, for all people of all faiths. We never looked [130] upon it as any other way.

Q. What's been the public reaction to the program, Mr. Thomas?

A. Very Good. As I said, we started off with six choirs, and now we're overwhelmed with requests. The youngsters want to come in and sing in the program. We have senior citizens, we have a Jewish group coming in this year to sing. They not only sing carols, but they sing all sorts of popular songs. We have had popular, we've had popular personalities. We had Marty Allen come in and read 'Twas the Night Before Christmas. We've had the Associations, we've had the Lettermen. We've had Lenore Nemens who appeared on Broadway in the Civic Light Opera. They come in and sing popular songs and carols. It's just a happy time of year.

Q. Is the purpose, is your purpose in arranging this to endorse any particular religion?

A. No.

MS. LITMAN: If the Court please, the witness answered before the Court had an opportunity to rule on my objection, but counsel has asked the witness his purpose. Unless that reflects, unless this witness is authorized to speak for the County Commissioners, if he is the person in charge of the Nativity scene and of the surrounding area, then that might be proper, but I don't think his purpose is otherwise proper.

THE COURT: I'll disregard his statement. Is that [131] all right?

MS. LITMAN: Yes, Your Honor.

Q. Finally, Mr. Thomas, has the grand staircase ever been used for any other purpose during the year, apart from this Christmas choral program?

A. Yes. It's used periodically for various events. It's reserved for kind of major events other times. We, what it stands out to me, was the 25th celebration of the Israels winning its independence. We had a major ceremony there with all kinds of dignitaries and flags and so forth. There are sculptures there, placed on display from time to time in the same area where we have the Nativity scene. It's any, any public group that wishes to use the grand staircase for any ceremony requests the Commissioners, and if they feel that it's a good program, then they grant permission. It is a public building and the public has access to it.

Q. Thank you, Mr. Thomas.

MR. McTIERNAN: Cross examine.

CROSS EXAMINATION

BY MS. LITMAN:

Q. Mr. Thomas, are you the County employee who is in charge of the choral program and the Nativity scene area?

A. Yes, ma'am.

Q. The schedule that is worked out for the choral program, do you work that out, sir?

[132] A. I polish it off. It is worked primarily by the Director of the Quaker Valley High School choir who is

knowledgeable about the best choirs in the County. He begins in September scheduling the choirs, and then a couple of weeks before Christmas, before Thanksgiving, rather, he turns it over to my office, and then if there are any openings and other groups wish to be added, we then add them in our office, and then we type it up and redistribute them.

Q. Where is your office, sir?

A. On the fourth floor of the courthouse.

Q. And with respect to the dates that are arranged for the choirs, those are coordinated through you; is that correct?

A. That's right.

Q. So that in order to use the County Courthouse for these carols or other programs, those dates have to be coordinated through you for the County; is that it?

A. Yes, ma'am.

Q. And that's because at the courthouse there are a lot of other activities taking place; is that right?

A. That's right.

Q. Now, let me just clarify one thing. You spoke about the area for the art exhibit; you remember that? And indeed, one of the exhibits to which you testified, Defendants' Exhibit F, reflects what you described as an art exhibit in the County Courthouse; is that right?

[133] A. That's right, yes.

Q. All right. Now, the art exhibits are under the control and supervision of the Allegheny County Bureau of Cultural Programs; is that correct?

A. That's right, um-hum.

Q. And that's different from your office?

A. That's right.

Q. So with respect to the area used for the art exhibits, the dates and the material on that are coordinated by the Allegheny Bureau of Cultural Programs; is that right?

A. That's right.

Q. But the choral program, the caroling that you described, that's coordinated by you?

A. That's right.

Q. And the dates on which the Nativity scene is displayed on the steps on the staircase, your office also coordinates those dates, sir?

A. Yes, ma'am.

Q. And Father, is it Yurko, did you tell us?

A. Yurko—Y-u-r-k-o.

Q. Is it you he calls to find out what day he's permitted to come in and put up the display?

A. That's right.

Q. Or do you call him and tell him, we're going to put it up certain times?

[134] A. Whoever thinks of it first. It is also, we have to coincide with his schedule. He picks the day when he can get away. He has a parish and also has duties at his diocese.

Q. So, on some occasions you call him and say, I'd like it to be this day; is that right?

A. Well, we tell him what day the choral singing will begin, and then he sees to it that it is set up in time for the choirs to be there.

Q. Now, on this year, as I understand it from Defendants' Exhibit B, the choral programs started on December 3rd; is that right?

A. December 3rd, that's right.

Q. And the Nativity scene, then, was put up November 26th; is that right?

A. The day before Thanksgiving, yes, ma'am.

Q. And this year did you call Father Yurko to tell him that that was the date?

A. My assistant did. I was on vacation Thanksgiving week, but my assistant—

Q. Your assistant is also a County employee?

A. Um-hum.

Q. What is his or her name?

A. Mrs. Wendy Charlton.

Q. And with respect to the storage of the Nativity scene figures in the County courthouse, as I understand your [135] testimony, Mr. Thomas, it's been for the last two years that you've stored it there?

A. Yes.

Q. And you did that because it was difficult for Father Yurko to take them back and forth; is that right?

A. They are plastic. He was afraid they would break.

Q. And you had the authority to allow him to store it there in the courthouse; is that right?

A. Yes, ma'am.

Q. That's part of the authority that you have been given by the County in your job; is that right?

A. Yes, ma'am.

Q. And so, you arranged that it would be stored there in the County Courthouse?

A. Um-hum.

Q. Is that right?

A. Yes, ma'am.

Q. You have to say, "yes", because when you nod—

A. Yes.

Q. Now then—

THE COURT: He doesn't have to say "yes."

MS. LITMAN: I meant instead of nodding.

THE COURT: Just answer one way or the other so the reporter can record it. But there's no requirement that you say either "yes", or "no". And we'll let you explain if [136] you need to.

Q. Now, then, with respect to the figures being stored, are they protected in some way so that they don't get knocked around?

A. I just lay them on the shelf, put a piece of paper over them so they will be dust free, and that's all.

Q. Now, as I understand your testimony, you're the person who assists Father Yurko in putting them on a dolly and taking them to the stairs; is that right?

A. That's right.

Q. And then, you say you leave him there to assemble them himself?

A. Yes.

Q. And do you direct the people at the County, this gentleman has permission to do that, and you just let him put these figures in there, he's here with my permission?

A. Well, there's no one to tell it to. I just take him there, and here is the empty space, and I say, go to it, Father.

Q. There's nobody in the County that's watching as he puts them up?

A. Frank is over there watching the art exhibits, but he knows we do it every year. There's nobody to talk to, that's all there is to it.

Q. What do you mean when you say "he knows", don't you mean that it's now understood that Father Yurko has your permission on [137] behalf of the County to put those figures up?

A. Yes, ma'am.

Q. He has your blessing, so to speak?

MR. McTIERNAN: Objection, Your Honor.

THE COURT: I think we ought to leave the word "blessing" out of this proceeding.

MS. LITMAN: Withdrawn, Your Honor. It's withdrawn.

THE COURT: You can ask if he's authorized to let the Father store the figures.

Q. He has your authorization?

A. Yes.

Q. Okay. Now, with respect to the choral groups, isn't it a fact that they perform approximately one hour on most of the days listed, or on a number of the days listed?

A. Yes. Some 45 minutes, some an hour. We leave it up to them. They are invited to come and entertain, and whatever time they wish, sometimes they go over, sometimes they go under. We let them do their thing.

Q. Well the, the longest choral program that is here lasts from—you can kind of help me out if I'm wrong, but is the longest choral program on any day during the entire time that you have the choral programs, is the longest one from 11:00 o'clock until 1:00 o'clock; that's correct, isn't it?

A. Yes, ma'am. Yes.

Q. And during the rest of the day there is no choral program?

[138] A. That's right.

Q. But the creche, of course, is there?

A. That's right.

Q. But the creche, of course, is there?

A. That's right.

Q. And during the days when there's no choral program as indicated on Defendants' Exhibit B, the creche remains?

A. Well, the courthouse is closed on Saturdays and Sundays.

Q. No, no, during the days when there are no programs, from the time the creche is put up, November 26th—

A. Oh.

Q. —until December 3rd, the creche is there?

A. Oh, yes. If it's up, yes. He came early this year because of his schedule. He had a funeral or something, so we said, whenever you can, Father.

Q. Okay.

A. He came at his convenience.

Q. And the way that that's arranged is you have discussions with him, or he has discussions with you and your assistant, or your assistant; is that right?

A. Yes, yes. Very simple. He just calls and says, when can I come in? And we say, whenever you want to.

Q. Now, you said that the P.R. Department, as I understand it, sends out certain news releases; is that right?

A. Yes, ma'am.

Q. Were you, as the P.R. Director for Allegheny County, made aware of the fact by the Commissioners that they had received [139] a letter from the American Civil Liberties Union, telling them that the Nativity scene violated the constitution; were you made aware of that, sir?

A. No.

Q. With respect to the art exhibits, I'd like to ask you some questions. Let me direct your attention to the art exhibit that's shown on Exhibit F, and I put Defendants' Exhibit F before you, sir.

Now, do you know whose art exhibit that is?

A. I do not.

Q. You don't have anything to do with that, do you?

A. No.

Q. That's an entirely different province, sir?

A. That's right.

Q. Or bailiwick?

A. Yes.

Q. With respect to the art exhibits, though, you do know, do you not, that none of that material is stored in any way in Allegheny County?

A. I don't know. I don't have anything to do with the program, so I wouldn't know.

Q. You said that if someone wants to use the grand staircase they, they get in touch with the Commissioners; is that right?

A. That's right.

Q. And you said, in substance, that if the Commissioners [140] think it's a good program, as you understand it, they give permission; is that about fairly stated?

A. They usually call me.

Q. And you give your input?

A. I give my input. If I think it's—about a month or two ago—

Q. Well, just tell me if that's correct. You give your input?

A. That's right.

Q. Isn't it a fact that there is no written policy or guideline to determine who will be permitted to come in and use the staircase; isn't that a fact?

A. I'm not aware of it. If there are any, I'm not aware of any.

Q. You've certainly never seen any such written guideline; have you?

A. I have not seen any.

Q. And you've never seen any kind of written policy; have you?

A. I have never seen any.

Q. The staircase where the Nativity scene now is, you refer to that as the grand staircase; is that right?

A. . That's what the architect called it.

Q. And would it be fair to say that you feel that that's kind of the focal point for people coming into the County [141] Courthouse?

A. No, because the, as I said, that is no longer the main entrance to the courthouse. The main, the courthouse, County Courthouse entrance now is on the ground floor, and I'd say 90, 95 percent of the people who come in go straight to the elevators and never see the grand staircase.

Q. For people using the staircase, certainly that's the focal point as they come up the stairs; is that correct?

A. If they come up the stairs, yes.

Q. And indeed, as your own exhibit shows, it's right there to the right of that staircase that the sign shows how to get to the County Commissioners' office; isn't that right?

A. That's right.

Q. And to the Sheriff's office?

A. That's right.

Q. And on the left to the Treasurer's office?

A. They have been there a long time.

Q. Would you agree, sir, that the Nativity scene occupies at least half, or perhaps two-thirds of that stairway?

A. I disagree.

Q. You would not agree that it—

A. I would not agree it takes that much of a space, no, ma'am. It's only, I think, five feet. The back of it, we walked it off, about five feet. The front is about three feet. It stands about three and a half feet high. The manger scene [142] itself, then we have a fence around it to protect the plants, the poinsettias and the evergreens and so forth from people stomping on them. But the, the manger set itself is only about five-by-three-by-three and a half. It's very small.

Q. Mr. Thomas, in terms of how much of the staircase one can use, would you agree that the Nativity scene, together with the framing normal arranagements around it, occupies over half of the stairway?

A. Don't forget, we have two stairways. We have a lower, and then a platform, and then the upper stairway.

Q. Okay. Focusing—

A. It occupies maybe, maybe a half of the lower staircase, but none of the upper, the upper, the level part and the next, the next level up. I think you can see that in the head on, in the other shot. This, I have a poor angle here. This is a side angle.

Q. With respect to the lower staircase that is, that the Nativity scene is on, we are agreed that it, together with the surrounding floral arrangements, occupies about half; is that right?

A. Of the lower area.

Q. Okay. When you testified that Father Yurko, I think you said, won't let us help, who was the "us" whom you were referring?

A. Well, any of my, any of my staff. Just two of us.

[143] Q. You've offered your services, I take it?

A. To put it up?

Q. Yes.

A. No way. It's too fragile. I wouldn't want to crack one of those.

Q. When you say "it's fragile", isn't it, aren't these figures the type that are mass produced, sir?

A. They may be mass produced, but I bet they are expensive.

Q. When you say you bet they are expensive, do you have any basis for saying that?

A. No, just seeing them in religious stores.

Q. You haven't priced these; have you?

A. No, ma'am.

Q. Isn't it a fact that from time to time County carpenters help in little things that have to do with the manger itself, or the railing?

A. I have never seen anybody help there.

Q. Do you have any reason to believe that County carpenters have helped from time to time?

A. I can't presume, no. I, as I said, I go back to my office when he arrives.

Q. My question was, do you have any reason to believe that County carpenters have helped with the manger or with the railing around it?

A. I would have no reason, because they are not in my [144] jurisdiction.

Q. In fact, you don't know what the County carpenters or the other employees who are not in public relations do at all; do you?

A. No.

Q. Now, you talked about Santa Clauses in the courthouse; is that correct? You talked about them?

A. Yeah, different—

Q. Isn't it a fact that on the grand staircase, and in this area, there is no Santa Claus; isn't that true?

A. This year there is no Santa Claus.

THE COURT: She means—

MS. LITMAN: I mean in a figure, Your Honor.

THE COURT: Not in the spirit of things, but in reality.

THE WITNESS: The spirit is there.

Q. You are agreed—you would agree in this area there is no replica or figurine of Santa Claus; is there, Mr. Thomas?

A. Not this year, that's right. There are wreaths, there are wreaths on the window and evergreens.

Q. You said that the Commissioners remind you every year to remember to dedicate the choral program to the families who have people missing in action; they remind you of that every year?

A. That's right, because one year we put the pictures of all [145] the men, the prisoners of war and the men missing in action that the family brought in, we put them around in front of the creche and offered prayers for their safe return.

Q. What year was that, sir?

A. In the '70's.

Q. And who offered the prayers, sir?

A. Who, what—

Q. One year the County put up photographs of the men, you say, who were missing in action, and prayer was offered before the Nativity scene for the safe return of all those men; is that what you said, sir?

A. The prayers were offered—

Q. For the safe return?

A. —for their safe return.

Q. And those prayers were before the creche; isn't that what you said, sir?

A. Well, before the creche, they were over the microphone.

Q. Didn't you say that the prayers were there before the creche; isn't that what you said?

A. In the area.

Q. Isn't that what you said, Mr. Thomas?

A. No. It was an area in front of the creche, separate from it, in which the prisoners of war families, and men missing in action put their loved ones pictures, because we dedicated, we annually dedicated the Christmas carol program to their [146] safe return.

Q. And it was in that area that prayers were offered; is that correct?

A. That's right.

Q. And that was with your authorization and approval; was it not, Mr. Thomas?

A. I arrange it, yes, ma'am.

Q. For most of the year the grand staircase is used as a staircase; isn't that correct?

A. Most of the year, yes, ma'am.

Q. Now, you said that it's been used for sculptures; has it?

A. Sculptures.

Q. On the staircase?

A. Yes, ma'am, yes.

Q. What is the last sculpture that you can recall being placed on the staircase?

A. You'd have to ask the cultural programs people.

Q. That has nothing to do with you; is that right?

A. That's right.

Q. So that the extent there may have been sculptures in that area, you yourself are not the person who arranges that?

A. That's right.

Q. And you don't really know about that?

MR. McTIERNAN: Objection. The witness testified he did see it.

[147] THE COURT: Well, let him speak for himself.

A. I have seen them from time to time, but I made no note of it. It's not my department's responsibility.

Q. It has nothing to do with your department?

A. That's right.

Q. It's the department, the Cultural Department?

A. Cultural Programs.

Q. And if I would want to know about that information I'd have to ask the Cultural Department?

A. That's right.

Q. You don't have any kind of record of that?

A. I do not.

Q. And if I'd want to know about the carpenters and whether they do work on the manger, that again, that's not your department?

A. That's right.

Q. Is it correct that it was some time after the Nativity scene was put up on November 26th that the poinsettias were brought in to frame it, around it?

A. Well, I imagine it was in a day or two. That's traditional. Again, Cultural Programs brings those in, and they can't bring them in until the set is there.

Q. When you say "they"?

A. Cultural Programs.

Q. With respect to the poinsettias, isn't it a fact that the [148] County pays for those?

A. I don't know. That's not, again, not my area. See, I don't know their responsibilities. You'd have to ask Cultural Programs.

Q. Isn't it a fact that the County employees place those around the Nativity scene?

A. I don't know. I've never seen them placed there.

MS. LITMAN: I don't have anything further, Your Honor.

THE COURT: Any redirect?

MR. McTIERNAN: No, Your Honor.

THE COURT: I guess they are through with you. You can step down.

Shall we quit 'til morning? What is your pleasure here?

MR. McTIERNAN: Your Honor, we'd be willing to continue. We only have two more witnesses, perhaps only one if we can get some stipulations from plaintiffs' counsel. It's up to the Court's pleasure.

MR. SPECTER: If the Court were agreeable, my inclination would be to finish today.

THE COURT: Well, it's not very, it's very definitely my pleasure. I guess I have help to consider here. How much longer do you think you'll take? I anticipated that you'd be arguing to me at least for 10-15 minutes.

Well, let's go for a few more minutes here and see how much [149] headway we make.

Go ahead and call your next witness.

MR. JANOCSKO: Call Mr. Hairston.

EUZELL HAIRSTON, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JANOCSKO:

Q. Would you state your name for the record.

A. Euzell Hairston.

Q. And what is your business address?

A. 225 Courthouse.

Q. And are you employed by the County of Allegheny?

A. I am.

Q. And in what capacity?

A. Director of Property and Supplies.

MS. LITMAN: Excuse me, I'm sorry?

THE COURT: He said he's Director of Property and Supplies.

MS. LITMAN: Thank you, Your Honor.

Q. You'll have to keep your voice up so that we can all hear you.

And what are your chief duties and responsibilities in that capacity?

A. I'm the landlord for all the County properties downtown.

Q. And as the Director of the County Department of Properties [150] and Supplies, are you familiar with both the City-County Building and the County Courthouse?

A. I am.

Q. And where are the courthouse and the City-County Building located in reference to one another?

A. The court, they are both on Grant Street. The courthouse is east on Grant, the City-County Building is west on Grant.

Q. And as the Director of the County Department of Property and Supplies, are you familiar with the arrangements between the City and the County with respect to the use of the City-County Building?

A. I am.

Q. And could you just generally describe that arrangement?

A. It's very simple, 50/50. Everything is 50/50, everything on the east side, if you go into the City-County Building, everything on the east side is the County and everything on the west side of the City County Building is the City.

Q. How many entrances are there to the City-County Building?

A. There's two main entrances, and total you have two, one on Ross, one on Grant, one on Forbes.

Q. And could you please tell us who is responsible for the maintenance of the Grant Street entrance to the City-County Building?

A. The City of Pittsburgh.

Q. And who is responsible for the Ross Street side?

[151] A. Allegheny County.

Q. Now, Mr. Hairston, are there any holiday displays that had been erected on the Grant Street side of the City-County Building?

A. Yes.

Q. And what are they?

A. Big Christmas tree.

Q. And could you tell us, to your personal knowledge, who erected the Christmas tree?

A. The City.

Q. And to your knowledge, were any County employees involved in the erection of the Christmas tree?

A. No.

Q. Have you generally been aware that a Menora has been erected on the Grant Street side of the City-County Building in past years?

A. Yes.

Q. And at the present time is there a Menora erected in that area?

A. No.

Q. In the past years who erected the Menora?

A. The City.

Q. To your knowledge, have any County employees been involved in the erection of the Menora in past years?

A. No.

[152] Q. If a Menora is erected this year, will any County employee, to your knowledge, be involved in that?

A. No.

MR. JANOCSKO: No further questions.

CROSS EXAMINATION

BY MS. LITMAN:

Q. Just one thing. I wasn't sure I understood your testimony, Mr. Hairston. Did you say you're the landlord for all the County property downtown?

A. Yes.

Q. Do the tenants in the building, in the City-County Building, do they pay rent?

A. What tenants?

Q. Well, are there tenants who pay rent?

A. Part of the City-County Building belongs to the City, part belongs to the County.

Q. Are there any tenants in the part that belongs to the County that you know of that pay rent?

A. No.

Q. Are there tenants in the part that belongs to the City that you know of that pay rent?

A. You'll have to ask the City.

Q. You don't know about that?

A. No.

Q. Do you have any tenants in the courthouse?

[153] A. No.

Q. The shoeshine person, is that a tenant?

A. No, he's not a tenant.

Q. He's just there by permission; is that it?

A. (Nods.)

MS. LITMAN: I have no further questions.

MR. JANOCSKO: Your Honor, our final witness would be Maura Minteer, who is the Director of the County Bureau of Cultural Programs. She would testify to the effect that as part of her general responsibilities as Director for that agency, they oversee the area known as the courthouse gallery forum. And in that area during the past several years a number of art displays have taken place.

She will also testify to the fact that her agency has no role in providing for, arranging, maintaining or disassembling the particular Nativity scene that's at issue here.

She would also testify that she has no role in arranging for the choral program.

She would testify that the agency does obtain the poinsettia plants and the Christmas trees that are present in the displays that have been depicted in the photographs.

Finally, she would also testify to the effect that the, her department has an employee who is stationed in the forum gallery area, and that he is stationed there throughout the year.

[154] Are you willing to stipulate Counsel?

MS. LITMAN: Oh, I didn't know, Your Honor, that I was being asked to agree to a stipulation.

As I understand it, the forum gallery area is an area that sort of adjoins on the other side of the landing.

THE COURT: Let me interrupt. It oftentimes takes longer to get a stipulation than to listen to the testimony. Let's call the witness and let's let her talk.

MAURA L. MINTEER, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JANOCSKO:

Q. What is your full name?

A. Maura L. Minteer.

Q. And what is your business address?

A. 1520 Penn Avenue, Pittsburgh, 15222.

Q. Are you employed by Allegheny County?

A. Yes.

Q. And in what Capacity?

A. I use—you said I was Director of Cultural Programs. My actual title is Manager of Bureau of Cultural Programs.

Q. I stand corrected.

A. That's all right.

Q. And for how long have you been employed in that capacity?

A. Since March, 1986.

[155] Q. And could you very briefly describe the purpose of the County Bureau of Cultural Programs?

A. Sure. The Bureau is, was established in 1980 by the County Commissioners at that time to work in cultural areas, to serve the need, the special needs and interests of Allegheny County Government, as well as to make performing and visual arts accessible to the community, the residents of Allegheny County.

Q. Now, as the manager—

MS. LITMAN: Excuse me, if the Court please, I certainly agree that the witness is going to say all that Mr. Janocsko asked. I would just like the opportunity to cross examine the witness to define the appropriate area. I mean, if he doesn't want to go through the testimony, I assume that he's correctly recited what she would say.

THE COURT: I guess this amounts to calling the witness for cross.

Do you have any objection?

MR. JANOCSKO: No.

THE COURT: All right. Go ahead, Ms. Litman. Your witness.

CROSS EXAMINATION

BY MS. LITMAN:

Q. Ms. Minteer, with respect to the area that has been referred to as the courthouse gallery forum, I'd like to put [156] before you Defendant Exhibit G which is a photograph of that of that area, and ask you whether the art exhibit which is shown is part of what comes under your work as manager?

A. This exhibit here, yes.

Q. You're pointing, when you say "this exhibit here", are you pointing to the canvas board towards the left side of the photograph Exhibit G?

A. Yes.

Q. That bear painting on them?

A. Yes. We also do, I think there was a question asked about the poinsettias and the Christmas trees. We do do that. We decorate that area of the courthouse for Christmas as well.

Q. At Christmas?

A. During the holiday season.

Q. Well, during that season in December through January. But aside from your decoration of the area around the Nativity scene, during that Christmas season, is it correct that the art exhibits start with that part of the courthouse that's shown on Exhibit G, the wall there that has the canvas boards; is that where the art exhibit area starts?

A. This particular exhibit is exhibited in that area that, if I can get, I think we would also be on this side. It goes both.

Q. Let me show you, it's on that area and on Exhibit E, does it, does it continue around to the front wall of the [157] courthouse?

A. Yes.

Q. And then similarly, does it extend over to the wall that would be open?

A. Yes.

Q. The wall that we can see on Exhibit G?

A. Yes.

Q. And the area, then, where you actually exhibit art, is it correct that that portion of the courthouse there does not encompass the staircase where the Nativity scene is shown?

A. In the particular exhibit, no, but other times, yes.

Q. Okay. But in the exhibit that's up there now?

A. At this particular time, no.

Q. Okay. Now, with respect to the staircase itself, and the place where the Nativity scene is, Mr. Thomas has described that as the most beautiful portion of the courthouse; did you hear that testimony?

A. Yes.

Q. Would you agree?

A. I haven't seen all, I haven't seen the entire courthouse, but it, it's a beautiful place to display art. It's correct. The stairway is a grand stairway.

Q. Now, with respect to the art exhibits that are displayed in your area, is there some written policy that governs what art will be permitted to be displayed there?

[158] A. Not what art. There's a policy, we have a, had a brochure printed in the time of the opening of the gallery that sort of expressed the purpose of the gallery forum. Not necessarily censoring, not saying specifically, we will have this kind of art and not that kind, but explaining the purpose of the gallery forum, why they developed it in the first place. There is also a written statement of responsibility. A lot of times the art that is exhibited there is, is coordinated with other art, art in other rooms, and we have in writing a statement of responsibility of what the County is willing to be responsible for, and what we hope they would be responsible for.

Q. Now, when you say the policy that was expressed in a written brochure, have you a copy of that brochure?

A. I personally—

MR. JANOCSKO: I have a copy. I'll provide it to you.

Q. Now, if someone wants to exhibit in the gallery do they get in touch with your department?

A. Yes.

Q. And is anyone who wants to exhibit permitted, then, to come in and put up art?

A. Connie Kerr, who is the Director of the gallery usually kind of has the final say. She has a plan of things that she has developed and worked out, and then, she certainly considers anything that comes up. There has been cases in the [159] past, I don't know, I don't know if I can bring them all forward. I wasn't there at the time. But there's been cases that things people would have like to have censored out and didn't.

Q. Well then, is it correct that anyone is permitted to exhibit there?

A. There would have to be some kind of a quality established. It couldn't be anyone just walking in with a photograph. Usually a theme is chosen.

There's also a copy of a list of each exhibit since the opening of the gallery. So, there's a theme chosen. Sometimes there are jury exhibitions and there's a jury involved that choose which pieces of art will be presented.

Q. When you say "quality", are you talking about quality in terms of works of art?

A. Quality in terms, I guess I am. I'm talking about what, whoever designed that particular theme, what the theme is, does the piece fit.

Q. Have you seen the Nativity scene, Ms. Minteer?

A. Yes.

Q. Have you seen the figures in the Nativity scene?

A. Yes.

Q. Are those commercially reproduced, mass produced figures?

A. I believe they are.

Q. With respect to the utilities that are used in the area [160] of the grand staircase, the County does pay for those utilities, as far as you know; does it not?

A. I imagine. I think that there is nothing—in fact, I'm positive there's nothing additional put in place as a, in the way of spotlighting or selective lighting on that particular scene, where it would do that in the gallery.

Q. But there is lighting in that area; isn't there?

A. Whatever there is year round is there now.

Q. Indeed on, on Exhibit D, that is an illuminated electric light where the Nativity scene is; is that right?

A. Yes, um-hum.

Q. So to the extent that the Duquesne Light Company sends a bill for that, as you understand it, the County pays for that?

A. As far as I know.

Q. All right. Do you know of any sculpture that was placed on the staircase other than the Nativity scene?

A. The Director of the gallery forum explained to us when we spoke about this—

Q. No, no; do you?

A. Did I personally? Not in my time since March.

Q. You've been there since March?

A. Yes.

Q. And you've never seen one on the staircase; is that right?

A. No, not on the staircase.

[161] Q. Did the County pay for the poinsettias?

A. Yes.

Q. And the shrubs that are in that area?

A. The Christmas trees, yes, and the ribbons and the decorations.

Q. And did the County employees assist in putting those floral displays—

A. Yes.

Q. —around the Nativity scene?

A. Yes.

MS. LITMAN: No further questions.

MR. JANOCSKO: No redirect, Your Honor.

MR. SPECTER: No questions.

THE COURT: I guess you can step down.

THE WITNESS: Thank you.

MR. JANOCSKO: Your Honor, the County has no further witnesses.

THE COURT: All right. We'll mark the testimony closed for the County.

Do you have some testimony, Mr. Specter?

MR. SPECTER: Your Honor, the only evidence that I have, I find that I can put in by stipulation, which Your Honor should welcome at this stage of the proceeding.

There is a sign underneath the Christmas tree on the platform in front of the City-County Building. It was placed [162] there at the same time as the platform was placed there, and I have agreed with Mrs. Litman that I cannot state whether the same sign was there in the past. However, this particular sign, and the words which I am about to read are there now.

"Salute to liberty. During the holiday season the City of Pittsburgh salutes liberty. Let the festive lights remind us that we are the keeper of the flame of liberty and our legacy of freedom. Richard S. Caliguiri, Mayor." And then there are references to the Pittsburgh Department of Public Works, which placed the sign there.

MS. LITMAN: I'd just like to be sure that the record is clear, Your Honor, that Mr. Specter has said the sign was placed there at the same time as the tree, or the platform for the tree, and that that comes after the letter which was written to the Mayor by Ellen Doyle on behalf of the American Civil Liberties Union. Is that correct?

THE COURT: Can we get a stipulation on how big the tree is and how big the Menora is that usually goes up beside the tree?

MS. LITMAN: With respect to the tree, Your Honor, I just, I want to make it clear that the tree is not in issue in this case.

THE COURT: I understand that, but I'm trying to get some perspective on size of the two things.

I have photographs of the Nativity scene here. Can anybody [163] stipulate how big the tree and the Menora are?

MR. SPECTER: I personally don't know, Your Honor. I can put Mr. Fisher on.

Your Honor, we have a stipulation to this effect, that if Mr. Roy Fisher, Superintendent of building maintenance for the City of Pittsburgh, were called as a witness he would testify that the Menora is approximately eight-by-eighteen feet, the Christmas tree is approximately 45 feet high, and the platform is approximately 20 feet by 20 feet.

MS. LITMAN: That is the platform on which the Christmas tree sits.

MR. SPECTER: Right.

THE COURT: How tall is the tree; you say 45?

MR. SPECTER: About 45 feet.

THE COURT: And the platform is?

MR. SPECTER: 20-by-20.

THE COURT: I assume that the tree is on the platform?

MR. SPECTER: That's correct.

THE COURT: And the Menora sits on the platform?

MR. SPECTER: That's correct.

MS. LITMAN: No, Your Honor, the Menora is not on the platform.

MR. SPECTER: The Menora is not there at the moment.

THE COURT: I realize it's not there now, but it's proposed to be there, because it was there last year.

[164] MS. LITMAN: But, Your Honor, the Menora, just to clarify, doesn't sit on the platform. We just clarified that is the platform for the tree. And the Menora sits to the right of that.

MR. SPECTER: That's right.

THE COURT: To the right of the platform?

MS. LITMAN: Yes, Your Honor.

THE COURT: On the ground?

MS. LITMAN: On the steps, Your Honor, or the arches, I'm sorry, on the arches.

MR. FISHER: Your Honor, if one looks at the front of the City-County Building, there are three rounded arches. The tree sits in the middle arch with its platform. Between the middle arch and the one on the right is an upright column, and the Menora is placed on that column, to the right of the Christmas tree.

THE COURT: All right, Any other testimony?

MR. SPECTER: One moment, Your Honor, if I may. Your Honor, I also advise the Court that the sign, the wording on which I read into evidence a few minutes ago, is approximately 18 feet by 4 feet.

THE COURT: All right, Are you all through now?

MR. SPECTER: We are, Your Honor.

THE COURT: Close the record.

MS. LITMAN: Excuse me, excuse me, Your Honor, if I [165] may, I might have a very brief piece of rebuttal. If the Court prefers—may I just have a moment?

Your Honor, I do have a rebuttal witness in the courtroom. I have not interviewed that witness. I can just take a moment and call that person, or put her on first thing in the morning. Her testimony would be very brief.

THE COURT: Go ahead, interview your witness.

I say, interview your witness and we'll try to finish it up here.

MS. LITMAN: All right, I need to take a moment.

MR. McTIERNAN: Your Honor, we ask for an offer.

THE COURT: All right. Wait 'til the witness is sworn. Have you finished swearing the witness?

JAY FINKELSTEIN, LAW CLERK: Yes, I have, Judge.

THE COURT: All right. Take the stand.

You can ask for an offer now.

(Sidebar conference was held on the record:)

MS. LITMAN: This witness will testify that she is employed by the Antidefammation League in Pittsburgh; that last year she went over to the County Courthouse in order to check to see whether a particular display, a poster which she considered to be offensive was going to be put up, and indeed, saw the Nativity scene being erected by a number of people. She asked those people who they were. They told her they work for the County. She asked them if they put up the [166] Nativity scene in other years. They said they put it up every year. They further told her that they maintain the Nativity scene. And that will be the substance of her testimony, Your Honor.

MR. McTIERNAN: Two objections, Your Honor. Relevance, because it's last year—

THE COURT: Beg your pardon?

MR. McTIERNAN: Relevance, because it has nothing to do with this particular Nativity scene, and also hearsay, Your Honor.

MS. LITMAN: Your Honor, these people are, were clearly there. I think that these are admissions. They are within the Federal Rules.

MR. McTIERNAN: They have no authority to speak—

MS. LITMAN: And that what they were doing was part of their duties. And I think further, what happened last year is clearly relevant, both on substance, and also to impeach the testimony of Mr. Thomas, who gave testimony clearly to the contrary.

THE COURT: Well, the difficulty is that there's no showing that these people were authorized to make an admission, which would be an exception to the hearsay rule. Now, of course, the Director of the Public Relations Department said that Father Yurko put this up year after year, and didn't require any County help.

[167] MS. LITMAN: And he—

THE COURT: But the offer to have this witness say that she talked to people who were putting it up and they said they worked for the County doesn't supply the exception to the hearsay rule. The general exception is that if a person is in a supervisory capacity and authorized to speak for an entity, that the testimony will be received as an exception to the hearsay rule. But there's no showing here that they were in a supervisory capacity. So, I assume you're objecting.

MR. McTIERNAN: Yes, Your Honor.

THE COURT: I'll sustain the objection.

MS. LITMAN: Your Honor, with respect to the testimony—

MR. McTIERNAN: Your Honor, Mrs. Litman doesn't even know who these people are.

THE COURT: I've already sustained the objection, so I don't see any point in looking up the law. I may be wrong on the law, you see, frequently am, but we've already made the ruling.

MS. LITMAN: All right. Thank you, Your Honor.

(Sidebar conference was concluded.)

THE COURT: I guess the objection to your testimony has been sustained, so we won't hear from you.

MS. LITMAN: Your Honor, we have nothing further.

THE COURT: All right. Close the record.

Now, Mrs. Litman will have the burden, so I guess you [168] should argue first, yes. You want to make any arguments on the record?

MR. SPECTER: Your Honor, I assume we'll have the opportunity to rebut Ms. Litman's?

THE COURT: Yes, you'll have an opportunity to rebut.

All right, Ms. Litman, they have deferred to you.

MS. LITMAN: Mr. Pushinsky is going to argue the law of the case, Your Honor.

THE COURT: All right. Your problem, as I see it, is to establish the difference between this and Lynch vs. Donnelly, which is the last word I see written by the Supreme Court on the general subject. That was the City of Pawtucket, Rhode Island case.

Could we agree to ten minutes per side? I have no objection, but my help has been here all day. Would that be sufficient?

* * * *

[3]
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THE COURT: We're ready to begin.

MR. SAUL: Your Honor, for the record, perhaps I could make my appearance. My name is Charles H. Saul, counsel for Chabad. And before I start, I would like to thank Your Honor for giving us the opportunity to intervene and introduce the limited evidence we will attempt to adduce today.

Your Honor, intervenor at this point calls Bob Gerardy.

BOB GERARDY, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SAUL:

Q. Could you state you name and address for the record, please.

A. Bob Gerardy, 943 Mellon Street, Pittsburgh.

Q. Mr. Gerardy, where are you employed?

A. With the City of Pittsburgh.

Q. And for how long have you been employed there, approximately?

A. Six years.

Q. And what's you job there?

A. I'm a photograph, dark room technician.

Q. Okay. Now directing your attention to December 22nd of 1986, do you recall taking a photograph or photographs—

A. Yes.

[3]

Q. — on that date?

A. They were photographs in front of the City-County Building.

Q. Okay. I show you what has been marked as Intervenor Exhibit Number 1. Could you identify that for us, please.

A. That is in front of the City-County Building, taken in December.

Q. Okay. And did you take that photograph?

A. Yes, I did.

Q. And does that fairly and accurately depict what you saw on that particular date?

A. Yes, it is.

Q. And I show you what's been marked as Intervenor Exhibit Number 2. Could you identify that, please.

A. It's the sign beneath the tree in front of the City-County Building.

Q. Okay. And does that fairly and accurately depict what you observed on that date?

A. Yes, it does.

MR. SAUL: Your Honor at this time I would move for the introduction of the Intervenor Exhibits 1 and 2.

THE COURT: All right. They will be received.

MS. LITMAN: Your Honor, if the Court please, I have an objection that I would like to pose to the Court.

THE COURT: All right.

[5]

MRS. LITMAN: I think it necessary that Your Honor see the photographs in order that my objection may be evaluated.

With respect to Intervenor Exhibit 1, Your Honor, and similarly with respect to Intervenor Exhibit 2, I would like to point out that the Christmas tree in front of the City-County Building is not an issue in this suit. No objection has been made in this suit to the structure of the Christmas tree, so that we would not object to a cropping of the photograph to show the menorah. We do object to its position with the Christmas tree.

And particularly with respect to Intervenor Exhibit 2, which is a blow up of the sign that pertains to the Christmas tree which pre-existed the menorah, which is a new sign this year which has nothing to do with the menorah as such, so that we think it irrelevant and we think it prejudicial to have it in this case.

Therefore, the objection is as to Intervenor Number 1 only to that part of it which shows the Christmas tree and the sign beneath it. And with Intervenor Number 2, it's objected to because it isn't relevant at all to what is in issue in this suit.

THE COURT: All right. Your objection may appear of record. Anyone else wants to make any comment: objection?

MR. SPECTOR: No objection.

MR. SAUL: If I may respond very briefly. It's our [6] position, it's here, this is the scene, this is the overall display that the City presented, and it's obviously, the whole display is obviously relevant. It all appears as one. We've already had some preliminary oral testimony as to the entire scene, which I believe Mr. Winicoff attempted to describe, but I believe a picture is worth a thousand words, and that such more clearly shows us a picture of the scene, and the Court and the reviewing bodies can review the entire thing rather than cropping.

THE COURT: All right. I've received the exhibits. The objection will be duly noted.

MS. LITMAN: Your Honor, we would like to ask that with respect to the Court's role as a finder of fact, that it be made clear either now or at such time as Your Honor does find the facts, that the sign with respect to the Christmas tree be limited to the Christmas tree, since it appears clearly on the photograph to have no relation to the menorah.

THE COURT: All right.

MR. SAUL: I have no further questions.

THE COURT: Any cross?

MR. SPECTER: None, Your Honor.

MR. JANOCSKO: None from the County, Your Honor.

MS. LITMAN: Yes, Your Honor, I have some cross examination.

CROSS EXAMINAION

[6]
BY MS. LITMAN:

MS. LITMAN: Do you know that exhibits, what exhibit number we are up to; do you have the number?

JAY FINKELSTEIN: No, we don't.

MRS. LITMAN: I think this one is 14.

Q. Mr. Gerardy, I show you a newspaper clipping bearing the sign on the top, the Pittsburgh Press, dated Monday, December 22nd, and depicting a scene which is titled in the picture "Festival of Lights", marked here as Exhibit 14, and ask you to look at that photograph, sir, and tell me whether you agree that on December 22nd that photograph accurately represents the menorah as it existed on that day?

A. The location of the menorah is correct.

Q. With respect to the persons in the picture identified there as City employees who are erecting the menorah, did its erection take place on that day; do you know?

A. I have no idea. I went and took the photograph on the 22nd.

Q. And at whose direction did you take the photograph on the 22nd.

A. By the City Solicitor, Mr. Specter.

Q. And did he direct you to do it at some time before that date? I mean how did you know to go on the 22nd?

A. No. I received a call on the 22nd and he asked me to get up there around noontime.

[8]

Q. And so by noontime was it already erected?

A. It was completed.

Q. Except for the two gentlemen on the ladders who are shown in that photograph, with respect to all the other placement on the photograph, does that comport with the way the menorah looked and where it was on the City-County Building when you saw it?

A. As far as the location of it, that is correct. The only difference between this and my photograph is I included the whole scene.

Q. Right. And did you include the whole scene, including the Christmas tree, because Mr. Specter directed you to do that?

A. No. I was instructed to take a photograph of the front of the City-County building, including the menorah, so I tried to include as much as I could.

Q. Now was it at someone's direction that the blow up of the sign underneath the Christmas tree was made?

A. I went in and took a closeup photo. That is actually a separate photo of the scene.

Q. Did Mr. Specter direct you to do that?

A. He wanted some closeup shots of the scene so you could read it. He was concerned maybe the wording of the scene couldn't be seen far away.

Q. So he directed you to take the closup?

A. Um hum.

[9]

Q. Now, with respect to Plaintiff's Exhibit 14, do you see where in the scene the boom is shown, and it says, "boom height, 11 feet 6 inches"?

A. Um hum.

Q. Does that, or does anything about your recollection help you to describe just how high the menorah was as you saw it?

A. I couldn't go by the relationship of the boom. The only thing I could go by would be the height of the tree. I would say it's half the height of the archway in the City-County Building.

Q. Okay.

A. That boom may be deceiving.

Q. Okay. Were there any other photographs that you took?

A. No. They were all the same composition.

Q. Okay.

MS. LITMAN: Your Honor, we offer into evidence Exhibit 14.

MR. SAUL: Objection, Your Honor. The picture has not been authenticated, and the Exhibit includes some descriptions here which the witness hasn't even testified to.

THE COURT: Oh, I think we'll receive it also.

MS. LITMAN: Thank you, Your Honor.

THE COURT: Objection will be overruled and we'll make it a part of the record.

MRS. LITMAN: I have no further questions, Your [10] Honor.

MR. SAUL: No further questions.

THE COURT: You better label this.

I guess you can step down.

MR. SAUL: Your Honor, Intervenor calls Ray Fisher.

RAYMOND D. FISCHER, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SAUL:

Q. Would you state your name and address for the record please.

A. Raymond D. Fischer, 1301 Dickens Street.

Q. Mr. Fischer, who are you employed by?

A. City of Pittsburgh.

Q. And what is your position with the City of Pittsburgh?

A. I'm Superintendent of Building Maintenance.

Q. And about how long have you held that position?

A. Approximately eight years.

Q. Briefly what's your job there, your job duties?

A. I maintain 200 City buildings, 34 swimming pools and two skating rinks with approximately 70 employees.

Q. Are you familiar with the City's display on the City-County building that was erected in 1986?

A. Very much so.

Q. Okay. And do you have any knowledge as to when the [11] Christmas tree and when the scene and platform and menorah were erected?

A. Erected the platform on the 13th of November.

Q. Okay. Now that's, showing you Exhibit, Intervenor Exhibit Number 1, what are you referring to as the platform?

A. The platform would be the, which the sign is posted to on the front which the tree is erected on.

Q. Okay. And what went up next?

A. What we do then is we paint the platform and then the tree is erected.

Q. Okay. Do you recall offhand what the date was the tree was erected?

MS. LITMAN: If the Court please, this is objected to on the grounds of relevancy. The platform for the Christmas tree, the Christmas tree itself, the sign under the Christmas tree are not at issue in this suit and we have not brought in any evidence to object to them and I object that this is not relevant.

THE COURT: Oh, I think we'll let him state briefly when he erected the whole thing.

If you can, just tell us when you erected the tree and the sign and the menorah and everything there.

A. Okay. The platform went up on the 13th of November, 1986, the tree on the 17th, and the menorah was erected on the 22nd.

Q. Okay. And?

[12] MS. LITMAN: The 22nd of?

A. Of December. I'm sorry, December.

Q. And, I'm sorry, the sign, then, was put up when?

A. The sign would have been put up—and I don't have the exact date. The way it works here, after the tree is up and decorated and everything, and then the sign is just attached to the front, the apron.

Q. And the sign then went up approximately how many days or so after the Christmas tree?

A. A few days.

Q. A few days, okay. And you mentioned that the menorah was not put up until December 22nd. Do you have any reason, do you know why it was not put up until December 22nd?

A. Yes. There was controversy and I was ordered to not put the menorah up at this time.

Q. Okay. And normally what would be the sequence of events; absent some of the legal controversy, what would be the sequence of events of how the display would be put up?

A. When we—I had the lifter up there to put the tree, tree up, I would have also put up the menorah.

Q. Is this the procedure that's been used in past years, to your knowledge?

A. Yes sir.

Q. And what's the proximate length of time to put up the menorah?

[13] A. A hour.

Q. Okay.

Q. Showing you then, again, Intervenor Exhibit Number 1, does that fairly and accurately depict the scene there at the City-County steps from December 22, 1986 until the display was taken down?

A. Yes, sir.

Q. And do you recall when the display was taken down?

A. It was right around mid-January.

Q. Of 1987?

A. 1987.

Q. Was everything taken down at the same time?

A. Yes, sir.

Q. And once the sign was put up shortly after the Christmas tree, does that, with the exception of the Hanukkah menorah, accurately depict what was on the City-County steps between the time the sign was put up and the time the menorah was put up?

A. Yes, it does.

MR. SAUL: I have no further questions, Your Honor.

MR. SPECTER: No questions.

MR. JANOCSKO: No questions.

CROSS EXAMINATION

BY MS. LITMAN:

Q. Mr. Fischer, isn't it a fact that the Hanukkah menorah is put up at a time to comport with the Hanukkah season?

[14] A. Yes.

Q. Now, indeed, the Hanukkah menorah has been put up in previous years; isn't that correct?

A. That's correct.

Q. Now, you've been the Superintendent of Building Maintenance for eight years; that's correct, isn't it?

A. Yes, ma'am.

Q. So that it's during your position as the Superintendent of Building Maintenance that the custom came about of putting up a Hanukkah menorah; isn't that right?

A. Well, it was, I think that it's been much more that they have been putting up the menorah. I'm not sure. I think the past superintendent before me was doing the same thing.

Q. Isn't it a fact that the erection of the Hanukkah menorah at the City-County building came about in approximately 1979 or '80?

A. To be very honest, I'm not sure. I couldn't tie that down. I'm just not sure.

Q. Now, with respect to the timing this year of the Hanukkah menorah and your testimony that it wasn't put up at the same time as the Christmas tree because of the controversy pending in this lawsuit, isn't it a fact that this lawsuit wasn't even filed until December 10th, almost three weeks after the erection of the Christmas tree?

A. That's very possible.

[15] Q. Let me show you a photostatic copy of the summons which marked the filing of the suit and show you that date. And what does it read?

A. 12/10/86.

Q. And 12/10/86 is about three weeks after the Christmas tree itself was erected; isn't that right?

A. Yes.

Q. You're nodding?

A. Yes. I'm sorry.

Q. And it's after the platform was erected; isn't that right?

A. Yes.

Q. And it is some approximately 20 days after the sign was erected; isn't that right?

A. Yes.

Q. Now, you recall, do you not, that in previous years, including 1985, a sign was put up under the Hanukkah menorah as well; isn't that correct?

A. I do not recall a sign being put up.

Q. Let's see if we can help refresh your recollection.

Q. I put before you a book entitled, "Let There be Light", subtitled, "30 Days in the Lives of the Chabad-Lubavitch Lamplighters", and direct your attention to that page noted as Pennsylvania, and the photographs on that page, including one on the lower right-hand side, and ask you whether, indeed, you [16] recognize that photograph as a scene showing the Hanukkah menorah in front of the City-County Building?

A. I would say, yes, that is the scene on the City-County Building.

Q. All right. Well, first—yes, it is the menorah at the City-County building.

A. Yes.

Q. And if the photograph has been identified both by the book and will be identified by other witnesses as one which was taken in 1985, would you agree that that's the way the menorah looked with the sign in 1985?

A. I don't really recall the sign.

Q. Do you see the sign well enough to agree that it reads at least at the top, Happy Hanukkah?

A. Um hum.

Q. You see that?

A. Yes.

Q. Does that refresh your recollection that there has been such a sign at the City-County Building?

A. I really can not recall the sign.

Q. You just don't remember at all?

A. I just don't remember, right.

Q. It is a fact, is it not, that the City employees erected the menorah, that is correct, isn't it?

A. Yes, that's correct.

[17]

Q. And it is correct, is it not, that City employees took down the menorah; isn't that so?

A. That's also correct.

Q. And it is a fact, is it not, that the City stores the menorah; isn't that correct?

A. That's correct.

MS. LITMAN: No further questions.

MR. SAUL: No questions, Your Honor.

THE COURT: I guess they are through with you. You can step down.

MR. SAUL: At this time, Your Honor, Intervenor calls Rabbi Yisroel Rosenfeld.

RABBI YISROEL ROSENFELD, having first duly affirmed, testified as follows:

DIRECT EXAMINATION

BY MR. SAUL:

Q. Could you please state your name and address for the record.

A. Yisroel—Y-i-s-r-o-e-l—Rosenfeld—R-o-s-e-n-f-e-l-d—2214 Shady Avenue, Pittsburgh.

Q. Rabbi Rosenfeld—first of all, are you a Rabbi?

A. Yes.

Q. And could you give us a brief description of your background, educational background?

MS. LITMAN: Excuse me for interrupting, Rabbi, but I [18] wasn't sure what the question was. Are you a—R-a-b-b-i?

MR. SAUL: Yes.

MS. LITMAN: Sorry.

Q. Could you give us a brief description of your background leading up to your ordination as a Rabbi?

A. My background began with my home, the practices in my home, leading into a day school education starting with preschool, going through high school, going on to rabbinical college for the ordination, for the specific ordination that I did receive, then leading into internship, basically being, following, watching, observing other rabbis.

Q. And how long of a intership was this?

A. Several years.

Q. And what's the significance of the internship?

A. Most importantly the significance of that is just learning the laws isn't sufficient to be able to present a Lubavitch viewpoint, a viewpoint of the law. One needs to know how to take what you see and how to read that, how to apply it to what needs to be done. The way to do that is by serving an internship with other rabbis that have had all the experience in that, observing them and watching them, learning from them.

Q. And what, you mention your family background. Could you be a little more specific with your respect to your family background and your education?

A. Talking about my family background. My grandfather was, [19] came from the old country about 65 years ago, was one of the first, held one of the first pulpits in a congregation in the Borobeck section of New York.

Q. Was he a Rabbi then?

A. He was a Rabbi.

Q. And your father?

A. He came from the old country as a Rabbi and then came to the States being a pulpit Rabbi, and a leading pulpit Rabbi. That's one of the Rabbis I had intership with, because we lived with him as well. My father is a pulpit Rabbi now.

Q. I see.

A. And has been so for many years.

Q. And briefly, you mention day school. Could you—what's a day school?

A. Basically a day school is one that conveys to the Jewish child an education in Jewish subjects as well as secular subjects, to enable the child then to go into the

world familiar with what his Jewish identity is all about, what Jewish rules and regulations are all about, and it is the kind of education that will give the child an education beginning with perhaps 8:00 o'clock in the morning until about 4:00 or 5:00 o'clock in the afternoon every day, for many many years.

Q. And your day school education began when?

A. When I was about eight years old. Takes us back about 27 years ago.

[20]

Q. And that continued through high school?

A. Continued through high school and then on to rabbinical college.

Q. And the ordination that you received, is there any other higher ordination than the one you received?

A. No, there isn't.

Q. And what is your current position?

A. Currently I serve as principal of Yeshiva Achei T'mimim; happens to be Pittsburgh Pioneer Day School. It's a day school that's been here in Pittsburgh for over 40 years. I now serve as principal of that day school.

Q. All right. And are you a teacher there as well?

A. Yes.

Q. Could you tell us what a responsum is?

A. A responsum is a—is a letter put together on rules pertaining to Jewish law.

Q. And have you authored any responsum?

A. Yes.

Q. Could you describe?

A. With different questions that have come up over the years that have been presented to me and I've been asked to author a responsum on that, I did the research on it and authored the responsum on that. Many of them have been printed.

Q. Okay. By the way, what do you teach at your school?

A. Jewish law.

[21]

Q. And you serve as a rabbinic legal consultant within the Jewish community in Pittsburgh?

A. A rabbinic consultant. I'm not sure what you mean by legal consultant. A consultant for Torah law, for Jewish law.

Q. Now, could you tell us, we're here, we've had the name Chabad mentioned. What is Chabad?

A. Chabad and Lubavitch, for that matter, the name is used either Chabad or Lubavitch is part of the Jewish community that looks generally, Jews have in the past looked to leaders for advice, for guidance. Chabad is a group that looks to the Lubavitch Rebbe Schneerson.

Q. Rebbe, we would spell how?

A. R-e-b-b-e.

Q. Okay.

A. Looks to him for guidance and it's part of an international movement that has been estimated to have over 100,000 followers internationally.

Q. Okay. And is that part of what some people would call the reformed, convervative or orthodox branch of Judaism?

A. It would be part of the orthodox.

Q. And the orthodox, is that the more traditional or less traditional part within Judaism?

A. More traditional, although, may I note that Chabad Lubavitch doesn't really look at the labels of Judaism as saying orthodox, conservative, reformed. A Jew is a Jew.

[22]

Q. Okay.

Q. Rabbi Rosenfeld, is the menorah a purely religious symbol?

A. No.

Q. What symbolic significance in general does the menorah have?

A. It carries many messages with it. It carries a message, an historical message, cultural message, a message of ethnic pride; a universal message.

Q. Okay. Let's go first to the historical message. What historically does the Hanukkah menorah connote?

A. It tells us what took place when the Jews were challenged by the Syrians, the Greeks, and it was the few in the hand of the many, and they were able to overcome that.

Q. Okay. And "they" talking about the historical events?

A. Historical events, that is correct.

Q. You mentioned cultural significance. What did you mean by the cultural message?

A. The Jews as the Jewish People, rather than the Jewish religion.

Q. I see. You also mentioned universal messages. What symbolic universal messages does did menorah have?

A. Amongst the messages, that a little bit of light dispels a lot of darkness, a message of freedom of minorities to allow them to practice whatever it is that they may want to.

[22]

Q. Okay. And what about political significance or messages?

A. The fact that the Jewish people at that particular time were able to overcome their oppressors in a political sense and allowed to establish what they wanted as their particular governing set up.

Q. Let's go to the religious message. First of all, are you familiar with the laws and the procedures regarding the lighting of Hanukkah menorahs?

A. Yes.

Q. And what's your background, or how is it that you're familiar with those procedures?

A. My education, be it Talmud, Code of Jewish Law. And intership again.

Q. And as far as place with respect to the menorah, and the lighting of the menorah, where do these laws and procedures apply to?

A. Looking into the sources of where, pertaining to the lighting of the menorah in the original sources, the place that the menorah is stated it needs to be lit is in the home, and in the home it is at the door post.

Q. Okay. And is it a religious obligation, or what's referred to as a mitzvah, to light a Hanukkah menorah in the home?

A. Yes, it is.

Q. Is it a religious obligation or mitzvah to light a menorah [24] in a public place?

A. No, it isn't.

Q. Is it considered in any way sinful or improper or a ritual omission to fail to light a Hanukkah menorah in a public forum?

MS. LITMAN: That's objected to, Your Honor, as irrelevant. The case has, does not depend, nor is the law in any way dependent upon what is sinful or what is an omission for Jews. Lemon teaches us, and Lynch versus Donnelly affirms, that these are not the tests.

The test, as the Court knows, is the govenment's position in advancing. If something has the effect of advancing or endorsing religion so that the particular practices or beliefs of some segment, or what is a religious obligation of a specific Jew or a particular sect of Jews, is not relevant in this case.

THE COURT: Oh, I think we'll let him talk. I think all he said was that it's not obligatory to light a menorah in a public place. We'll let that remain of record.

Go ahead.

Q. Okay. Is it, would it be any type of a ritual omission to fail to light a Hanukkah menorah in a public forum?

A. No.

Q. So, in summary, then, where do the Jewish laws apply to with respect to the lighting of the Hanukkah menorah?

[25]

A. In the home.

Q. Are you familiar with Hanukkah lightings sometimes in synagogues?

A. Yes.

Q. Okay. Is it a—is that done uniformly within Jewish synagogues; do all Jewish synagogues do that?

A. I wouldn't say all.

Q. Okay. Is it—is it a religious obligation to light a menorah in the synagogue?

A. No, it isn't.

Q. And if one would light a Hanukkah menorah in either a synagogue or outside in a public forum, would one still have to light a Hanukkah menorah in the home?

A. Yes.

Q. To fulfill the ritual?

A. Yes.

Q. More specifically then, is the lighting of a menorah in a public forum, such as the steps of the City-County Building, a religious obligation?

A. No.

Q. And is that lighting a ritual act?

A. No.

Q. In terms of Judasim, what would be, what would be examples of—what is considered, I should say, a religious act?

A. There are many of them. Examples of some of them would be [26] lighting a menorah in one's home, eating whole meat kosher, many more.

Q. Okay. And are those in some way related to what we've been calling a mitzvah?

A. Yes.

MS. LITMAN: Excuse me, could the reporter please read back the Rabbi's previous answer?

(Witness' answer read back by official reporter.)

Q. So then, what, then, in terms of Judasim—

A. Can I—

Q. You want to explain something?

A. Yes. I think for a better example, rather than using the example of a mitzvah of eating only kosher, one does not have to eat something that—put it this way, it isn't an obligation for somebody to eat the kosher thing. If somebody doesn't eat kosher that's an omission of something of the Jewish religion, but for purposes of an example of a religious ritual, if we use something that, such as a Massusad on the door post of a home.

Q. Okay. Now, then, in Judasim, what is considered a religious, a religious act or ritual act?

MS. LITMAN: Your Honor, if I may, rather than interrupt, I would like a continuing objection to those questions which are posed, for what is considered for any individual a religious act or obligation isn't, that isn't the [27] test. I understand Your Honor has ruled.

THE COURT: I think now we're getting into unnecessary matters. You see, as I understand the thrust of his testimony, and to some extent it's repetitious because the

Rabbi that testified at the hearing back in December I think said that the lighting of the menorah was not necessarily a religious act, would depend upon the circumstances. This man's testimony is the same.

He says, as I understand him, that it's not a obligation in the religious sense to light a menorah in a public place. Therefore, you're laying the ground work for an argument that this display of the menorah on the steps of the City-County Building was not necessarily a religious display, therefore, did not necessarily have any religious significance. And I think that's what you're getting to. But it's not necessary for him to relate everything that one might do that did have religious significance, because we could perhaps listen to a whole long list of things that did have religious significance.

MR. SAUL: Okay.

THE COURT: So I don't think you need to go into that.

MR. SAUL: Okay. Thank you.

Q. Is the candelabra, the menorah itself, what is of religious significance, or is it the lighting of the candles, [28]
or both or what; what is the religious—where does the religious significance lie?

A. The lighting of the candles in one's home.

Q. What, then, is the primary significance of a Hanukkah menorah in a public forum?

MS. LITMAN: Excuse me, Your Honor, there is no public forum at issue here. We're talking about the City-County Building. There is—excuse me.

MR. SAUL: I'll withdraw the question.

MS. LITMAN: To the extent that counsel has referred to it as a public forum, we want to interpose the objection, because clearly it is not, no evidence has been laid for that. And I think there is no basis on which to even refer to the City-County Building as a public forum. It's not Lafayette Park, which is across from the—

THE COURT: I don't know whether it's the right description or not, but historically I suppose the City-County Building one called a forum. I seem to recall that the Romans considered the vast plaza in front of their buildings as a forum. And I suppose some people would say a forum must contain humans who discuss things. Other people would say a forum is simply a big plaza in front of a public building. What difference does it make what we call it. It's the steps of the City-County Building.

MS. LITMAN: And I have no objection to the latter.

[29]

My objection—and, of course, the manner in which Your Honor describes it would not be objectionable. The use of the word "public forum", or the words "public forum", to the extent they are meant to imply what the Courts and Federal Courts have indicated are public forum, are a public forum is a very different thing from what Your Honor has described, and in those they have legal signficance as to what must be done there to make it be a public forum, as to what the City would have to permit, whether it wanted to or not, in order to have it be a public forum. And as I understand the testimony in this case the Chabad was given permission by the City. There are none of the elements that would comport with the Court's decisions as to what are public forums. That's why this, the City-County Building, for example, would be totally different from a public park, and if Your Honor—

THE COURT: Oh, I don't think we need argue about definitions here. Let's just let the record show what the pictures, what the photographs show. It's the steps of the City-County Building.

MS. LITMAN: I have no objection to using the term, City-County Building steps.

THE COURT: It's public property. I don't know that it makes any difference what you call it.

MR. SPECTER: Your Honor may I just add, with all due respect, I must join in the objection, even though it appears [30] to me the question has been withdrawn, because we do suggest that the term "public forum" is a term of art in the law and has been so defined by the Supreme Court in many cases. And therefore, I would join in the objection of Mrs. Litman.

MR. SAUL: Your Honor—

THE COURT: I still don't understand the objection has very much significance. You just object to the attorney here calling this a public forum because you say a public forum has a definition. So, we'll assume that the attorney doing the questioning or the witness answering the questions cannot establish what a public forum is. So it doesn't matter what they call it, your point is it has a definition. So I think we're wasting time.

Go ahead with your next question.

MR. SAUL: Yes.

Q. What—

MR. SAUL: I'll rephrase my question, Your Honor. And we'll argue this in briefs, I guess.

Q. What, then, is the significance of the menorah in a public place such as the City-County Building?

A. The significance would be to reach out to as many people as possible to who otherwise the message will not get across to as far as ethnic pride, just as would the St. Patrick's Day parade be a message of ethnic pride for somebody to identify themselves with, as well as relaying all the messages that the [31] menorah carries as mentioned before.

Q. Okay. Is the menorah itself an inherently religious object?

A. No.

Q. And on what do you base your answer?

A. Inherently religious object has specific acts as to the way one needs to deal with the sanctity, such as books of Torah, or as specifics, the way one can or cannot discard of it, or in what manner or what fashion. The menorah doesn't have any of those rules. There's no sanctity in time to the menorah itself.

Q. And examples of objects within Judaism that would have this inherent religious significance would be the one that you mentioned, the torah and so forth?

A. That's right.

Q. What happens, for instance, if a Torah should drop to the ground?

A. One needs to fast, because of the sanctity of it.

Q. And are there—

A. Again, also, if the Torah can no longer be used it needs to be buried in a special manner.

Q. What about a menorah?

A. There aren't any rules relating as to what needs to be done to the menorah after its use. One may do with it what one pleases.

[32]

Q. And what can menorahs be made of?

A. Just about anything.

Q. Could you give us examples of menorahs that you've seen made out of different materials?

A. Made out of bottle caps, pieces of tin—

Q. And?

A. Cups.

Q. And can one just discard it when one's through with it?

A. Yes.

Q. And does one, is that violating any ritual, or mitzvah, or tenents of Judasim by doing so?

A. No.

Q. Just for visualization purposes, I show you what's been marked as Intervenor's Exhibit Number 3. Could you identify this?

A. Yes.

Q. What is this?

A. A menorah.

Q. It's an acceptable menorah?

A. Yes.

Q. And if I dropped it to the ground, any problem with that from a religious standpoint?

A. No.

MR. SAUL: Your Honor, I'd move for the introduction of Intervenor Exhibit 3.

[33]

MS. LITMAN: Objection as to relevance, Your Honor. It's not the menorah in issue. I'm sure there are many kinds of menorahs.

THE COURT: Well, I have no reason to sustain any objection to it except that seems to me it's kind of impractical for the clerk to deal with, and we have pictures, photographs of the real menorah in this case. And I think we can describe what this one is for the record. It is a small piece of metal. It's about six inches long and two and a half inches wide and it has receptacles for candles and small wire legs on it. And therefore, it's admissible to show what a menorah looks like, but it's excluded only because it's difficult to handle.

MR. SAUL: I'll withdraw it.

THE COURT: And I believe almost anybody, in any event, has seen many menorahs. They are commonly displayed during the holiday season. I think I can take judicial notice of the fact that I've seen them in many places. So, we don't need to add it to the record.

MR. SAUL: Thank you.

Q. Have you observed menorahs and candelabras of this nature being used at other times of the year besides Hanukkah?

A. Yes.

Q. And what have you observed it being used as other than on Hanukkah?

[34]

A. Be it political symbols, such as the one, the symbol of the State of Israel, or as symbols of art, or whatever one would like it to be used as. It's up to the individual.

Q. Would it be improper to use it as a candelabra at other times of the year.

A. No.

Q. Have you observed it used as such at other times of the year?

A. Definitely.

Q. And is it any kind of a religious act at that time?

A. No, just a common candelabra lighting of the room.

As a matter of fact, in my own home we use what we use as a Hanukkah menorah for purposes of putting in candles to brighten up a room for occasions.

Q. Now, is a menorah a symbol of the Jewish religion?

A. No.

Q. And could you explain.

A. When used on Hanukkah in the home it is definitely symbolizing a religious ritual, religious act that one is obligated to do; whereas, at other times the menorah can symbolize anything that one wants it to symbolize.

Q. Does the menorah placed in the home, and lit in the home and so forth remind one of a miracle that, a miracle from God?

A. Yes.

Q. Does that make the menorah into a religious object?

[35]

A. No.

Q. Could you give me examples of other objects which may remind one of a miracle or one, reminds one of God but which would not be considered a religious object?

A. Pertaining to Hanukkah itself you can find several examples, such as if there's a commonly used dradel, which is a little something that spins that has some Hebrew letters on it that says "nes godol shaya" It's n-e-s——g-o-d-o-l——shaya—s-h-a-ya—I may be misspelling it. It's approximately—shom—s-h-o-m—relating to the miracle that occurred on Hanukkah. Nevertheless, it has no sanctity this time to it. It's a toy that's used for children to play with; it's a game that's used, that's played. The game is basically played by putting coins into a pot and if it lands on a gimel, the one that has their hand on the gimel wins the whole pot of coins there and so on. The shom make him put in another coin. Basically it's only, it's a toy, yet it reminds one of the miracle that occurs. Similarly so, when—

Q. Before you go on, I'm not sure if you mentioned the —let me first identify Intervenor Exhibit Number 4.

Q. Would you identify what Intervenor Exhibit Number 4 is?

A. A dradel.

Q. And the letters that are on there are, those are Hebrew letters?

A. That's correct.

[36]

Q. And what do they signify again?

A. A miracle happened, occurred.

Q. And there's a, one letter that's looks like a backward "C" on it?

A. Um hum. That is a nain.

Q. And the nain stands for; and nain means?

A. A miracle.

MR. SAUL: Your Honor, I move for introduction of Intervenor Exhibit 4.

MS. LITMAN: Your Honor—

THE COURT: I assume no objection.

MS. LITMAN: I don't know how it's relevant.

THE COURT: We'll receive it. I take it it's groundwork for an argument that the menorah in a public place has no more significance that a dradel.

MR. SAUL: Or just because it may remind one of a miracle does not make that, in and of itself doesn't make the menorah a religious object.

THE COURT: All right.

MR. SAUL: Okay.

Q. You mentioned there were some other Hanukkah symbols?

A. Another symbol, it's customary also to eat lotkas on Hanukkah.

Q. Lotkas?

A. L-o-t-k-a-s.

[37]

Q. And lotkas are?

A. Potato pancakes.

Q. And why is that customary on Hanukkah?

A. Which are fried in a lot of oil. The custom of it is, because to remind us of the miracle that occurred with the oil with the lighting of the menorah. Again, that in itself is not a religious object, it isn't a religious symbol, yet it reminds us of the miracle.

Q. Okay. Just a few last things.

MS. LITMAN: Your Honor, I would like the Court to know I was not going to object to the introduction of a potato lotka.

THE COURT: All right.

Q. Now, are you familiar with menorahs being lit around Hanukkah time outside other than at the City-County Building?

A. Yes.

Q. Approximately how many have there been in the past few years that you're aware of?

A. In this particular City?

Q. Just in this particular City.

A. I would say somewhere between five and ten.

Q. Okay. And yet you've also asked and been granted permission to display one at the City-County Building. Why is it that those others out in public don't suffice?

MS. LITMAN: That's a leading question, Your Honor. [38] The witness has not said they don't suffice. That's counsel's testimony.

THE COURT: I think that's right. He hasn't said yet that the five or ten aren't sufficient.

MR. SAUL: I'll—

THE COURT: I don't know that anybody knows how many are sufficient, or whether it has any significance, or whether it makes any difference.

Go ahead. Ask him why they like to have it at the City-County Building if you want to.

MR. SAUL: Okay.

Q. Could you?

A. Okay. As mentioned before, we wants the message to come across to as many people as possible, and generally when one wants to bring a message across, the place that it's brought to historically has always been the City-County Building.

Just a couple of weeks ago, must have been about a month ago or so, there was a demonstration for Soviet Jewry. Where was it brought to, the City-County Building.

Q. Okay.

A. Because that's a place where people see it, more people see it, and it's important to bring it there, to carry the message.

Q. Do you know, by the way, who sponsored that demonstration on behalf of Soviet Jewry at the City-County Building?

[39]

A. I believe it was the B'Nai B'Rith.

Q. And that's the B'Nai B'Rith as in Anti-Defamation League of B'Nai B'Rith?

A. That's correct. And many other organizations joined in.

Q. You mentioned the, one of the messages of the Hanukkah menorah being that of religious liberty. Is that solely religious liberty for Jews?

A. Most definitely not. Perhaps that would be the antecedent of that. It points out religious liberty for anyone, for any, specifically any minority to act as they feel appropriate as a minority.

Q. Would that also be for people who do not want to be part of a religion?

A. Yes. It's the message basically of freedom of one's consciousness.

Q. In any way by placing or asking the City to place the menorah on the City steps, are you in any way attempting to establish Judaism as some kind of a national religion?

A. Most definitely not.

Q. And in any way by the displays of the menorahs are you attempting to have people convert to Judaism?

A. Definitely not. As a matter of fact, Jews have always stayed away from looking for converts. We don't look for converts.

Q. And to the extent that we have mentioned God here and [40] whatever religious message there maybe at certain times and certain places, in Judaism is it considered to be just a Jewish God or what?

A. No. It's a God for the entire universe.

Q. The messages that you have described for the Hanukkah menorah and it's significance and the significance of the holiday and so forth, are those, to your knowledge, solely the views of Chabad?

A. No.

Q. What are they the views of?

A. Of Jewish law, Halahau.

Q. And have you, have you had such messages being displayed by reform and conservative branches, or people within the, rabbis within the branches of Judaism?

A. Yes, I've seen them.

Q. Just finally, and for purposes of clarification, Mrs. Litman asked a witness about a sign that was displayed in that book, "Let There be Light". Are you familiar with that sign?

A. Yes.

Q. Okay. Could you describe the circumstances behind the placement of that sign and—

A. That sign happened to be placed there by an individual on his own, and was there for perhaps a half hour or so for him to take a specific picture he wanted. After that it was no longer there. I don't believe it was there at all throughout [41] any other time than for those few minutes that that particular person wanted those pictures.

Q. Okay. And was that, did the City display that sign?

A. No.

Q. Okay. And was Chabad itself responsible for that sign being placed there?

A. No.

MR. SAUL: I have no further questions, Your Honor.

MR. SPECTER: No questions.

JANOCSKO: No questions.

MS. LITMAN: May I just have a moment, Your Honor?

CROSS EXAMINATION

BY MS. LITMAN:

Q. Rabbi Rosenfeld, is it appropriate to refer to you as a Lubavitch Rebbe?

A. Yes.

Q. And I think you've already explained that Chabad, which is the intervenor in here in this suit, and Lubavitch are the same thing?

A. That's correct.

Q. You do agree, Rabbi, do you not, that in Pittsburgh there are approximately 45,000 Jews?

A. Approximately.

Q. And of those, some follow the orthodox tradition; is that correct?

[42]

A. Correct.

Q. Many follow the reformed tradition; is that correct?

A. Correct.

Q. Many follow the conservative tradition; is that correct?

A. Correct.

Q. Some follow the reconstructist tradition; is that correct.

A. Correct.

Q. Now, I think you already explained on direct that Lubavitch would come under the heading of those who follow the orthodox tradition; is that correct?

A. Correct, but not limited to.

Q. Are you saying that there are people who follow the Lubavitch tradition who would not be considered orthodox Jews?

A. That would consider themselves, that would look for advice to Lubavitch Rebbe, though not consider themselves orthodox Jews.

Q. So that all Lubavitch Jews are considered orthodox, but not all orthodox Jews are Lubavitch; is that correct?

A. If you—let me explain.

Q. Are you able to tell me if that's correct?

A. Well, depending on what you consider Lubavitch Jews.

Q. Do you, as a Lubavitch Rebbe, follow the pronouncements and the advice and the opinions of the chief Rebbe, who is known as the Lubavitch Rebbe—R-e-b-b-e?

[43]

A. Yes, I do, along with hundreds of thousands of other Jews throughout the world, whether or not they consider themselves orthodox, quote/unquote.

Q. I see. With respect to those Jews in the Pittsburgh area who follow the Lubavitch traditions, as a general

statement would you consider those people to be orthodox Jews, as opposed to reformed, conservative or reconstructionists?

A. Mostly orthodox.

Q. Now, it is true, is it not, that not all orthodox Jews follow the dictates or pronouncements of the Lubavitch Rebbe?

A. Correct.

Q. And indeed, within the group of Jews who follow—

A. May I, may I just add one more thing to that?

Q. Yes.

A. When talking about the dictates of the Lubavitch Rebbe, I'd like to rephrase that, rather than dictates, but advice and dealing with that with Lubavitch viewpoints, or messages that he relays, it isn't only limited to Lubavitcher or orthodox Lubavitchers.

Q. With respect to the Lubavitch Rebbe, you follow his opinion; do you not?

A. Yes.

Q. Indeed, you consider his opinion binding; do you not?

A. Yes.

Q. Now, getting back to types of orthodox Jews, is one branch [44] of people who follow orthodox Jewry known as Hassidic Jews or Hassidim?

A. Yes.

Q. And are the Lubavitch Jews one type of Hassidim?

A. Yes.

Q. But indeed, there are a number of subdivisions of Hassidim; are there not?

A. That's correct.

A. Nevertheless, when talking about many following the advice of the Rebbe, it isn't limited to his, to Lubavitcher study.

Q. With respect to Hassidim, there are at least nine subdivisions of Hassidim; are there not?

A. That's correct.

Q. And of those nine, the Lubavitch branch is one; is it not?

A. That's correct. However, many of those leaders of those other branches have come to the Lubavitch Rebbe to seek counsel and advice.

Q. With respect to the people who follow the Lubavitch tradition in Pittsburgh, is it a fact that they constitute perhaps three percent of the Jewish community here?

A. I'm not sure of the percentages, but perhaps so.

Q. Well, what is your estimate as to the percentages?

A. I don't of the figures on that.

Q. You know, do you not, that there is a synagogue where the [45] majority of Lubavitch families attend; is that correct?

A. That's correct.

Q. And with respect to that synagogue, what is the name of it?

A. Lubavitch Center.

Q. And at the Lubavitch Center there are approximately 100 perhaps 150 families who attend the synagogue at Lubavitch Center; isn't that correct?

A. That's correct.

THE COURT: If you can get him to concede on cross examination that the Hanukkah, rather the menorah has some religious significance, apparently that would be contrary to what he said on direct, but the make up of the population of the Jewish people in Pittsburgh and where they attend and the number I don't think are particularly important.

MS. LITMAN: Your Honor, what these questions go to is the weight that you should give to this witness' testimony with respect to his opinion as to whether or not a menorah is a religious symbol or fosters a religious purpose, and with respect to that, we think it's important for the, for you to see, Your Honor, and for the record to reflect what his opinions are based on, and as well demonstrates that it differs significantly, as you already know, from previous testimony.

But as I think you will hear from the testimony of this witness, that his opinions as to the law, as what it [46] provides and as to what is a religious symbol, are not the opinions held by the vast majority of Rabbis and experts in religious law with respect to the Hanukkah menorah. So that is why we have inquired as to the numbers of Lubavitch.

THE COURT: All right.

MR. SAUL: Your Honor, if I may—

MS. LITMAN: Excuse me. In addition to that, Your Honor, as I think will become apparent in the testimony, on cross examination it will be developed there is other

significance to my questioning concerning the Lubavitch traditions and the followers.

MR. SAUL: Your Honor, if I may, I've been patient throughout the questioning, but I, of course, share your objection to this.

THE COURT: I didn't make any objection, I just—

MR. SAUL: Your sentiments. This is basically irrelevant, and we're not here on a numbers game. Either is has religious significance or it doesn't. The extent of it, does it have other significance and so forth, that's the significance of it; not the numbers game.

THE COURT: We'll put it this way, we'll try to be patient and listen to the questions and answers. Go ahead, Mrs. Litman.

MS. LITMAN: Thank you, Your Honor.

Q. Thereby—now, with respect to the Lubavitch Rebbe, is it [47] correct that his name is Menachem Schneerson?

A. That's correct.

Q. And his principal headquarters is in Brooklyn, New York; is that correct?

A. That's correct.

Q. And it would be accurate to call him the spiritual leader of the Jews, as far as your concerned; is that correct?

A. Correct.

Q. It is certainly true, is it not, you would agree, that reformed Rebbes don't consider Menachem Schneerson to be their spiritual leader; don't you agree that that's true?

A. Nevertheless, I will.

Q. Do you agree that that is true?

A. I'd have to explain my answer.

Q. I would like to hear your answer if I may, first, Rabbi.

Do you agree that for the most part reformed rabbis do not consider that Menachem Schneerson is their spiritual leader; would you agree or not?

A. As far as spiritual leader, perhaps so. But nevertheless they also do seek his guidance and counsel. Not in every area, but in areas of their concern.

Q. I don't think you're answered my question.

MRS. LITMAN: Could the reporter please read back the question?

[48] I'll save the reporter some work here. You can answer the question, "yes", or "no". Do you agree that he's the religious leader. You could say, "yes, but", or "no, but", and we'll let you give a brief explanation.

A. Question again, please?

Q. Do you agree that reformed rabbis don't consider Menachem Schneerson to be their spiritual leader?

A. Yes, I agree. But they, nevertheless, seek his guidance.

Q. Do you agree that conservative leaders, conservative rabbis don't consider Menachem Schneerson to be their spiritual leader?

A. No, I don't.

Q. Now, with respect to the Lubavitch Rebbe, he has been the spiritual leader for the Lubavitch followers for over 40 years; is that correct?

A. Yes, approximately.

Q. Approximately 40 years; is that correct?

A. Yes, approximately. Yes.

Q. And he regularly gives messages to his followers; does he not?

A. Yes.

Q. In fact, his talks or messages are widely disseminated to his followers; isn't that correct?

A. Correct.

Q. And that's done orally by telephone or radio hook ups; is that correct?

[49]

A. Correct.

Q. And sometimes his talks or messages are transcribed in writing and sent to his followers; is that correct?

A. Correct.

Q. And indeed, there are times when the Lubavitch Rebbe has appeared and had his talks on cable television; isn't that right?

A. That's correct.

Q. And sometimes those talks go on for many hours; isn't that correct?

A. Correct.

Q. Incidentally, in what language are his talks given?

A. Generally in Yiddish. However, along with that there's always simultaneous translation in many, many languages, sometimes even ten languages.

Q. But in order for one to understand the Lubavitch Rebbe's messages as they are given from him personally, one would have to understand Yiddish; is that correct?

A. When it's given in Yiddish. I've heard it given in other languages as well, and I don't understand it.

Q. Now, you've already agreed that you consider the opinion of the Lubavitch Rebbe to be binding; is that correct?

A. Correct.

Q. You indicated, Rabbi Rosenfeld, that in checking on a question of Jewish law you consulted certain sources; is that [50] so?

A. Correct.

Q. With respect to those sources, would the Torah be one of the sources you would check?

A. Yes.

Q. And?

A. As a primary source.

Q. And the Torah, of course, consists of the five books of Moses; is that so?

A. Correct.

Q. Now, in addition to that, do you also consult a book called the Talmud?

A. Yes.

Q. And is that a book of commentaries on the law?

A. Yes.

Q. And then you referred also to something that you consult which you refer to as the Code of Jewish law?

A. Yes.

Q. And that in Hebrew is called the Schulchan Aruch; is it not?

A. Correct.

Q. And that sets forth what the laws are that govern the proper conduct of people who follow the Jewish faith; is that right?

A. That's correct, 100 percent.

[51]

Q. And you would agree that the laws set forth in the Schulchan Aruch, the Code of Jewish Law are binding; would you not?

A. That's correct.

Q. Incidentally, do followers of the Lubavitch Rebbe believe in the coming of the Messiah?

A. Definitely. It's one of the principles of faith that Hemonnes mentions.

Q. And you believe in the coming of the Messiah; do you not?

A. Yes.

Q. Do the writings of the Lubavitch Rebbe, are any of them collected in a book called the Tannya—T-a-n-n-y-a?

A. Yes.

Q. Is one of the things in which the Lubavitch followers believe the transmigration of human souls?

MR. SAUL: Objection. That's totally irrelevant. We've now gone very far ahead of the issue in this case, Your Honor.

THE COURT: I think that's right. I doubt if it will affect his credibility if he answered that either way. So we'll sustain the objection to that.

Q. Rabbi Rosenfeld, you feel, do you not, that when you follow the pronouncements of the Lubavitch Rebbe, that that equates with following the pronouncements of the Torah and thus will help to bring about the coming of the Messiah; isn't that [52] correct?

A. The Lubavitch Rebbe's pronouncements aren't any different than what the Torah tells us to do. He just relates to us what the Torah tells us to do. There's nothing new that he pronounces.

Q. What he relays to you that the Torah tells you to do, if you follow that don't you believe you will be helping to bring about the coming of the Messiah?

A. Correct.

Q. Now, you've given testimony concerning the menorah here, and you were asked a lot of question by counsel concerning a menorah, not limited to a Hanukkah menorah. So let me ask you this. Are you now saying here in court that a menorah is not, in your opinion, a holy and religious symbol in the Jewish faith?

A. Any menorah; is that what you're saying to me.

Q. A menorah, yes. Is there a menorah—your testimony is, as I understand it, is that a menorah has no significance.

THE COURT: In a public place. He said it had significance.

MRS. LITMAN: The Rabbi testified as well—

THE COURT: He said it had significance in the home.

MRS. LITMAN: Well, there he was talking about, there he was talking about a Hanukkah menorah. What I'm dealing with, Your Honor, is he said "a menorah", and there are, most [53] menorahs are not Hanukkah menorahs alone or not Hanukkah menorahs.

THE COURT: Well let him answer for himself.

A. Other than the menorah in the Holy Temple, the answer is they don't have any holy—what was the word you used? I'm sorry.

Q. The word I used was whether you agree that they were a holy, that whether you were stating that they were not a holy and religious symbol?

A. That's correct, other than the menorah that was in the holy temple.

Q. In other words, it is your testimony that a seven branch menorah is not a holy and religious, a holy and religious symbol; is that your testimony?

A. Ma'am, there isn't a seven branch menorah now that is a holy religious symbol.

Q. Rabbi Rosenfeld, when you have a menorah in a synagogue, a seven branch menorah in a synagogue at the Ark, is that not a religious symbol?

A. That's correct.

Q. That is not a religious symbol; in your opinion, that's not a religious symbol?

A. It is. Within itself, it is not.

THE COURT: I didn't hear you.

A. Within itself, the fact it happens to be a menorah doesn't [54] make it a religious symbol.

MR. SAUL: Just for purposes of clarification, I wonder if Mrs. Litman might consider that we're really talking about an eight branch menorah here. I think she's just misspeaking herself in referring to seven branch.

MS. LITMAN: I'm not misspeaking myself. I appreciate counsel's assistance, and I am not misspeaking myself.

THE COURT: She says that she's not mistaken. She appreciates your help, but she's not in need of it.

MR. SAUL: Okay. Just trying to make the record clear.

THE COURT: Go ahead, Mrs. Litman.

Q. Now it is true, is it not, that a menorah is mentioned in the Torah; is that correct?

A. That's correct.

Q. And indeed, you would agree, would you not, that a directive was given by God to Moses, according to the Torah, that the menorah be placed in the holy temple; is that correct?

A. That's correct.

Q. And when you speak of that menorah, you are speaking of the menorah that has seven branches; is that correct?

A. That's correct, different from the menorah of Hanukkah which is something entirely different.

Q. Right.

[55]

MS. LITMAN: Move to strike the nonresponsive part of the witness' answer, Your Honor.

THE COURT: Oh, we won't strike it. I won't attach much signifiance to it.

MS. LITMAN: Thank you, Your Honor.

Q. Now, Rabbi Rosenfeld, isn't it a fact that commonly menorah are placed within synagogues near or at the Holy Ark?

A. In some synagogues.

Q. I show you a photograph which has been marked for identification as Plaintiff's Exhibit 15 and ask you to examine that photograph of the interior of a synagogue in Europe, in Vonn—V-o-n-n—and ask whether in that photograph you recognize an object which is known as a menorah?

A. I recognize an object that is known as a menorah, as well as a candelabra.

Q. Is there an object there that is known as a menorah?

A. Yes.

Q. I'm going to ask you to take the red pen, and if you'll be kind enough to do so, Rabbi, would you please circle the menorah.

I show you now a photograph marked for identification purposes as Plaintiff's Exhibit 16 depicting a synagogue in Cologne, Germany, and ask you whether looking at that synagogue you recognize there an object or objects that are known as menorahs?

[56]

A. Yes.

Q. And how many are there, Rabbi?

A. Two.

Q. And are they at or near the Ark?

A. Pretty close.

Q. And when we speak of the Ark in a synagogue, will you agree that we are talking about the place where the holy scripture, the Torah, is kept?

A. That's correct.

Q. Similarly, on Exhibit 15 is the menorah placed in proximity to the Ark in that picture?

A. Yes.

Q. Now, would you be kind enough to circle the menorahs in the Exhibit 16.

Q. Rabbi, you are familiar with a number of congregations and synagogues in the Pittsburgh area; are you not?

A. Yes.

Q. Are you familiar with the Torah Hadum synagogue on Negley Avenue?

A. Yes.

Q. I show you a photograph marked for identify purposes as Plaintiff's Exhibit 17 and ask you whether you recognize that as a photograph of the Torah Hadum synagogue?

A. Yes.

Q. And what is the likeness which is carved in or shown on [57] the front of that synagogue in a prominent place?

A. There's a menorah placed on the building.

Q. Okay. Would you agree, Rabbi, that a menorah such as one sees on Exhibit 17 is something which is commonly associated with synagogues?.

A. It might be.

Q. Now is it your position that the only menorah which is a holy and religious symbol is the one that was originally placed by Moses in Jerusalem?

A. In the Holy Temple, that's correct.

Q. Would you agree, however, that the other menorahs that one commonly sees in synagogues today are based upon that original menorah ?

A. Not necessarily. As a matter of fact, the shape of the menorah one commonly sees is much different than the one that was originally in the Holy Temple.

Q. The menorahs which I have shown you in Plaintiff's Exhibits 15, 16 and 17, are common shapes of the seven branch menorah; are they not?

A. Yes.

Q. Now, it is your opinion, is it not, that a seven branch menorah is commonly looked upon by non-Jews as a symbol of Judaism; isn't that so?

A. Yes, and, no. Judaism as Jewish people; not necessarily Jewish religion.

[58]

Q. As I understand your testimony, you do agree that the Hanukkah menorah carries a religious symbol, is that correct, a religious message?

Is that correct?

A. In part.

Q. Well, you agree that it does carry such a message; is that correct?

A. Yes, it does, and precisely in someone's home.

Q. And it is correct, is it not, that it is a remembrance of a miracle that God performed; isn't that correct?

A. Yes, it is.

Q. And it is a remembrance of that miracle when it is lighted in places outside the home as well; isn't that true?

A. It can be.

Q. Well indeed, don't you agree that lighting it in a public place makes public that miracle that God did?

A. It probably would.

Q. It is intended to do so; is it not?

A. Along with other messages as well.

Q. Is the answer to my question, yes?

A. Yes, along with other messages as well.

Q. And the miracle that, that God performed is a miracle that he performed for the Jewish people; isn't that correct?

A. Specifically for the Jewish people, but it's normally performed for the world to observe and watch and take lessons [59] of.

Q. The people who were actually involved with that miracle that Hanukkah celebrates, they were Jews, weren't they, Rabbi Rosenfeld?

A. That's correct.

Q. And the oil that was kept for eight days when there was only enough for one day, that miracle concerned the oil that lit the menorah in the Temple; isn't that correct?

A. That's correct.

Q. And that Temple was where the Jews worshipped; isn't that correct?

A. That's correct.

Q. You spoke of certain acts which are designated as mitzvahs; is that right?

A. Yes.

Q. And it is your belief, and it is a tenet of the Jewish faith, is it not, that Jews are directed to perform mitzvahs?

A. Correct.

Q. And indeed, isn't it your belief that performance of a mitzvah helps to advance the coming of the Messiah?

A. Correct.

Q. Indeed, don't you believe that the performance of a single mitzvah could tip the balance and bring about the redemption?

A. That's correct.

Q. The lighting of the Hanukkah menorah in the home is a [60] mitzvah; is it not?

A. Yes.

Q. Now, as one of the followers of the Lubavitch Rebbe, you try, do you not, to listen to his talks and to read his messages?

A. Yes.

Q. And isn't it a fact that the Lubavitch Rebbe has given talks concerning the Hanukkah menorah?

A. Yes.

Q. And the Lubavitch Rebbe has given talks concerning the lighting of the Hanukkah menorah in public places; isn't that a fact?

A. Yes.

Q. And indeed, you yourself first heard such a talk somewhere around 1980; isn't that correct?

A. Correct.

Q. And there are publications of his speeches or directives that stem from about the, about the 1979 period up through the present concerning the lighting of Hanukkah menorahs in public places; isn't that right?

A. Correct.

Q. And when you heard Rabbi Schneerson talk about the lighting of the Hanukkah menorah in public places, isn't it a fact that you felt that he believed it was important to have Hanukkah menorahs lit in public places?

[61]

A. Yes.

Q. And isn't it true that you felt you wanted to attempt to do everything you could to follow his opinion and directives; isn't that correct.

A. Correct.

Q. You wanted to advance his preachings and his ideas; isn't that correct?

A. Correct.

Q. And you, you agree that with respect to the messages that the Hanukkah menorah relays, the messages that are relayed are the Jewish ways to relay the message; isn't that correct?

A. That's corrrect.

Q. And one of the things that the Lubavitch Rebbe said and that you believe was that a public lighting of the Hanukkah menorah makes public the miracle; isn't that correct?

A. That's correct.

Q. Now, not only you, but other Lubavitch followers of the Lubavitch Rebbe have participated throughout the United States in fostering the public lighting of Hanukkah menorahs; isn't that so?

A. That's correct.

Q. Now, as I understand your testimony, there are certain rules or laws that pertain to the lighting of the Hanukkah menorah; is that so?

A. That's correct.

[62]

Q. Some of the rules apply to lighting the Hanukkah menorah in one's home; isn't that so?

A. Yes.

Q. Different sets of rules or laws apply to lighting the Hanukkah menorah outside the home; isn't that correct?

A. There aren't any rules mentioned as to how the menorah outside of the home should be lit.

Q. In public.

Are you saying that there are no rules or laws dealing with how the Hanukkah menorah should be lit outside the home?

A. That is correct. There are customs.

Q. You do agree, do you not, that in the Code of Jewish Law, what you called the Schulchan Aruch, there is a provision that applies to the lighting of a Hanukkah menorah outside the home?

A. In a confirmation.

Q. There is such a law; is there not?

A. There is mention of a custom.

Q. And that's in the Code of Jewish Law; is that correct?

A. Right, specifically mentioned as not a law; however, it's a custom that some communities have.

Q. Well, it's within this Schulchan Aruch, the Code of Jewish Law that you teach; isn't that correct.

A. That's correct. However the Code of Jewish Law also mentions different customs that different communities have [63] become accustomed to do. This is one of them.

Q. Isn't it true that you consider the Schulchan Aruch provisions to be binding?

A. Yes.

Q. So that whatever you call it, the provision in the Schulchan Aruch providing for the lighting of the Hanukkah menorah outside the home is something that you would consider to be binding and follow; isn't that correct?

A. Schulchan Aruch states it as a custom. A custom means it doesn't have to be done; that the communities that have the custom to do it, to do it; whereas, Schulchan Aruch can state it has to be done, it's obligatory, then it's binding to do it.

Q. Rabbi, do you recognize the volume that I'm placing here before you as a volume of the Schulchan Aruch?

A. Yes.

Q. And do you see the inset provision?

A. Yes.

Q. Now, you and I spoke of the way in which to say, to make public or publicizing in the Hebrew language, and, indeed, I think you agreed that the word for that is what?

A. Pirsumay nissah.

Q. And pirsumay nissah means, does it not, making public the miracle?

A. That's correct.

[64]

Q. And that's what appears in the Schulchan Aruch; does it not?

Just tell me whether it appears here in the Schulchan Aruch.

MR. SAUL: Excuse me, could you clarify what she's talking about as far as it being?

MS. LITMAN: I'll give you the citation. Of course, I'm sure the Rabbi can give us the citation.

Q. Can you not?

A. I'm just not sure what you're asking. It—what do you want me to show you?

Q. Let me do it this way.

A. There's a lot of—

Q. I have made a photostatic copy of that book and highlighted the portion of which I am speaking.

Q. You see the highlighted portion I have marked there?

A. Yes.

Q. Can you tell me what the proper citation is for that?

A. What is stated is very clearly—

Q. No. The citation, what I mean is the number of the law.

A. The number of the law?

Q. How would you identify where it appears?

A. It's in what we call Seaman, it's in the section referring to Hanukkah and it's in 771, paragraph, paragraph seven, in the Ramaud.

[65]

Q. And would a fair translation in english of what is stated there in Hebrew or perhaps in Hebrew and Aramaic can read: And in the synagogue we place it on the southern wall, and we light and we bless in the synagogue because of pirsumay nissah making publicly known the miracle.

Would that be a fair translation?

A. It would be a fair translation. However, it needs to be taken within the context of what's said. Initially the Schulchan Aruch deals with the rules as to where it has to, where one is obligated to light the menorah, then the Schulchan Aruch goes on to explain that when one would put it in the synagogue, if one has that custom to, and when he does, he, the Schulchan Aruch goes on to explain where he would place that.

And then he can also make a blessing for it, because along with its messages it also carries a message of publicizing the miracle. However, the Schulchan Aruch goes on to say one cannot fulfill ones obligation of lighting a menorah by lighting one in the synagogue. That is not sufficient.

Q. Right.

A. He needs to go back home and light the menorah in his house to fulfill his obligation.

Q. If one makes public the miracle to the public as the Schulchan Aruch explains, one nevertheless has to light a menorah in his home; is that what you're saying?

A. That's correct.

[66]

Q. Okay. Now, with respect to the message that the Schulchan Aruch, the Code of Jewish Law that we just talked about with respect to the message that it talks about in that section, the message that it talks about is making public the miracle; is that correct?

A. That is correct.

Q. In your testimony on direct I noticed, Rabbi Rosenfeld, that you indicated that in the original sources directing Jews about lighting menorahs that they were to be placed at the door post, did you say; is that correct?

A. That's correct.

Q. And is that true because there was a desire or a directive that the menorah, the Hanukkah menorah be placed in such a place that it could be seen by the public or people outside the home?

A. Most importantly by people in the home; in addition, for people walking by to see it as well.

Q. And the purpose of having it at the door post was so that the people outside would be able to see it; isn't that correct?

A. That's correct.

Q. Now, with respect to the rules or the customs set forth in the Code of Jewish Law concerning the lighting of the Hanukkah menorah, isn't it a fact that the same rules apply to lighting the Hanukkah menorah that stands outside the Yeshiva, for [67] example, as apply at the City-County Building?

A. A menorah standing outside of a Yeshiva is not mentioned anywhere. It's for that reason that you would find very few of those menorahs around. Nevertheless, it's also something that's being done for the messages that it carries, and the way that is done is similar to the way that it's done in a synagogue.

Q. And with respect to whatever rules there are or customs there are, except for the fact that in a synagogue one might also light the Hanukkah menorah in the morning as well as at dusk, isn't it true take the same customs would be used for lighting the menorah in the synagogue, outside the synagogue, on top of the Yeshiva or at the City-County Building?

A. Except for one additional thing, which is that the question of whether one is permitted to make a blessing becomes more of a question when it's a public menorah outside of a synagogue.

Q. Yes. Well, indeed, you yourself have seen the chief Lubavitch Rebbe in Pittsburgh make a blessing on, at the public menorah on the steps of the City-County Building; isn't that correct?

A. Yes, I have.

MR. SAUL: Could I make one more stab at clarifying the record, and that is Mrs. Litman mentioned that chief Lubavitch Rebbe in Pittsburgh. I think that's somewhat
[68]
ambiguous as to whether or not she's referring to the Lubavitch Rebbe who's located in New York coming to Pittsburgh and lighting or does she mean a Lubavitch Rebbe located in Pittsburgh who lit it.

Q. Rabbi Rosenfeld, did you have some question in your mind as to what I meant?

A. Well, we're referring to, obviously, Rabbi Posner.

Q. Yes. And Rabbi Posner is the Rabbi who was sent here some 40 years ago by the predecessor of the current Lubavitch Rebbe; isn't that right?

A. That's correct.

Q. And the predecessor Lubavitch Rebbe who is now dead directed Rabbi Posner to come here and to open a Yeshiva; isn't that right?

A. That's correct.

Q. And Rabbi Posner, who follows the Lubavitch Rebbe's philosophy in preaching, came here and opened an Yeshiva; isn't that right?

A. That's correct.

Q. And he is the senior Rabbi in the Lubavitch movement here in Pittsburgh?

A. That's correct.

Q. And he was the Rabbi you were talking about who made the prayer; isn't that correct?

A. That's correct. However, the Lubavitch Rebbe has not done [69] directives on whether to make a rebra or not on the public menorah, whether or not to make a blessing.

MS. LITMAN: Your Honor, if I could just take a moment. I have a number of pamphlets that will make it a little simpler for counsel to follow.

THE COURT: Take your time.

Q. Now, getting back to the Lubavitch Rebbe's statements concerning the placing of public menorahs, in response to a subpoena which was served upon you directing that you gather together such pronouncements or writings that you could find, did you produce and bring here today certain writings, photographs, books and pamphlets that are involved with the Lubavitch Rebbe's talks and opinions concerning the public placements of Hanukkah menorahs?

A. Yes.

Q. Is one of the writings that you produced in response to the subpoena a book entitled, "Let There Be Light", sub-heading, "30 Days in the Lives of the Chabad-Lubavitch Lamplighters"?

A. Yes.

Q. I'm going to put that book before you and ask you to compare that book with these excerpts that are marked as Deposition Exhibit 4 and tell, tell me whether the exerpts come from that book and are reproduction, photostatic copies of the writings in that book.

[70]

A. Yes.

Q. Indeed, the last page contains a photograph of the Hanukkah menorah that was at the City-County Building here in 1985; is that right?

A. That's correct.

Q. The book which you have before you was published by whom?

A. Merkos L'inyonei Chinuch.

Q. What is that?

A. That is a Lubavitch publication house.

Q. Okay. And on the jacket does there appear an exerpt from a—let me withdraw that question.

On the jacket of that book is there some explanation of how that book, "Let There Be Light", came about?

A. Yes.

Q. The book was published in 1986; is that correct?

A. That's correct.

Q. And in the explanation on the jacket does it state "We must all become lamplighters, igniting the sparks that lie dormant in one another's hearts?

A. Yes.

Q. And is that the lamplighter phrase referred to on the cover?

A. Yes.

Q. And indeed, is it correct that Rabbi Schneerson asked his emissaries around the globe to submit reports to him and [71] photographs of their activities during the Hanukkah season in the Jewish year 5746—on our calendar 1985—did he request that?

A. Correct.

Q. And as a result of that his followers sent him various photographs and reports; did they not?

A. Correct.

Q. And a number of those photographs are contained in the book, "Let There Be Light"?

A. Correct.

Q. And as you look through the book, doesn't it set forth State by State photographs of the public displays and lightings of Hanukkah menorahs in the United States and elsewhere?

A. Correct.

Q. And indeed, there is such a photograph of what is going on, what was going on in 1985 in Pittsburgh; is that right?

A. Correct.

Q. And the photographs that are displayed are photographs that are meant to show Rabbi Schneerson and to have included in this publication what the activities are of his, or were during that season of his followers; is that correct?

A. Correct.

Q. Now, the artist's conception of a beacon of light on the front page is explained inside as a beacon of light illuminating the world with the light of Torah and mitzvot; is [72] that correct?

A. Correct.

Q. And mitzvot, you have already explained, are religious acts that Jews are directed to perform?

A. Correct.

Q. Now, in that book there is an article entitled, The Street Lamplighter, and a photograph of Rabbi Schneerson, the Lubavitch Rebbe; is that correct?

A. Correct.

Q. And it quotes that Rabbi Schneerson spoke of a Chassid as being like a street lamplighter; is that right?

A. That's correct.

Q. And the quotation from the Rabbi there where he quotes what is written is "A Chassid—and again, a Lubavitch is a type of Hassidic Jew; is that right?

A. Correct.

Q. And the Rabbi says, quote, there, "A Chassid is one who puts his personal affairs aside and sets out to light up the souls of Jews with the light of the Torah and mitzvot;" isn't that correct?

A. That is correct.

Q. And he states further in his quotation, "Jewish souls are ready and waiting to be kindled;" isn't that correct?

A. That's correct.

Q. On the next page, explaining more about the lamplighters, [73] does it recite that it is not enough to illuminate ones own life, but a Chassid has to exert himself to bring the light of Torah out to the farthest reaches of his influence?

A. Correct.

Q. And would you agree that that is true?

A. Correct.

Q. And you follow that preaching; do you not?

A. Correct.

Q. Isn't it true that in the month of Hanukkah, and particularly focusing in this book in the month of Hanukkah in 1985, that the Lubavitch Rebbe encouraged his emissaries to step up their activities and work even harder to spread the Torah?

A. The Lubavitch Rebbe does that on a continuous basis, not limited to that particular time.

Q. In the book on the heading "lamplighter" isn't it correct, and haven't I substantially quoted that the Lubavitch Rebbe in a public address asked his representatives to submit reports and photographs of their work over a period of approximately 30 days that included the Hanukkah period; is that correct?

A. Correct.

Q. And does it state there that the Rabbi encouraged his emissaries to step up their various activities that month, and to work with even more alacrity than usual in spreading the light of the Torah?

[74]

A. That's correct.

Q. Do you have the place there in your book?

A. Yes.

Q. And isn't it correct that among the areas that the Rabbi placed special emphasis on, it's recited that one of the areas that the Rabbi gave, the Rabbi gave special emphasis was public Hanukkah gatherings; is that correct?

Does it so state?

A. It's correct for the specific message that he mentions in his letter that I rely on as well.

Q. Does the book state, and I quote, "The Rebbe placed special emphasis on four areas of concern." Have I quoted it correctly so far?

A. Correct.

Q. And is one of those areas described in the book as "Public Hanukkah gatherings, particularly on the eighth day of Hanukkah"; is that what it says?

A. That's correct.

Q. Now, on the next page do you see the heading, A Month of Mitzvot?

A. Correct.

Q. And that means a month of these religious acts the Jews are to perform; is that correct?

A. Correct.

Q. And there does it state "Hanukkah is a particularly [75]
appropriate occasion for the kindling of lamps in the metaphorical sense of stirring the soul as well as in the literal sense"; is that what it says?

A. Yes.

Q. Again, there's a picture of the Lubavitch Rebbe?

A. Correct.

Q. Incidentally, is it true that a Talmudic scholar known as the Rashba stated in one of his responsa or interpretations of the law that it is a mitzvah to publicize anyone who performs a mitzvah?

A. That's correct.

Q. Do you agree with that?

A. Correct.

Q. And in this book put out by the Lubavitchers, do you see the section beginning with the paragraph, the second complete paragraph on the next page that reads, "and we pray"; you see that?

No, two more pages.

A. Yes.

Q. In talking about the accounts that are to be sent in of the Jews all over the world to the Rebbe, does it state "And we pray that these accounts will inspire others to lend their efforts to the all important work of spreading the light of Torah and mitzvot to each and every Jew, in keeping with the Talmudic dictum, quote 'one mitzvah brings along another,' " [75] end quote within quote, end quote.

Is that what it states?

A. Yes.

Q. And you do agree that spreading the light of Torah is a religious act; is it not?

A. Well, spreading the light of Torah can have several connotations.

Q. Can you answer my question first; do you agree that it's a religious act?

A. I need more explanation as to what—I mean, a religious act—

MRS. LITMAN: I will withdraw the question.

Q. Would you turn to that section in the book that shows the photographs in the Pittsburgh area that were gathered up and sent to the Lubavitch Rebbe; do you have that before you?

A. Yes.

Q. And on that page does it depict photographs of four locations erected by the Chabad house of Pittsburgh?

A. Yes.

Q. And indeed, the one on the right, that menorah, it indicates—is that the Jewish Community Center in the Squirrel Hill section of Pittsburgh; is that correct?

A. Correct.

Q. And you so recognize it; don't you?

A. Yes.

[77]

Q. And in the center it depicts the public menorah erected, the Hanukkah menorah erected at Yeshiva Achei T'mimim. That's where you're the principal; isn't that correct?

A. Correct.

Q. Of course, you recognize that; d you not?

A. Yes.

Q. On the left there is one at a student union; is that correct?

A. That's correct.

Q. And to the right, and the largest photograph on the page is the menorah in question here, the one outside the City-County Building in Downtown Pittsburgh; is that correct?

A. Correct.

Q. Now, in fact, you have witnessed the lighting of the Hanukkah menorah at the City-Council Building; have you not?

A. Yes.

Q. And you've already said you've heard the prayers recited by the Rabbi; isn't that correct?

A. Yes.

Q. And in the photograph that you have before you in the book, "Let There Be Light", indeed, we can see that there are flames, and the Hanukkah menorah has been lit; is that right?

A. That is correct.

Q. And if one were able to see closely, I think you can recognize, can you not, members of the Lubavitch community who [78] are standing there before the lighted menorah; isn't that right?

A. That's correct.

Q. When one makes the prayer at the Hanukkah menorah, isn't it true that one invokes the name of God?

A. That's correct.

Q. Now, with respect to the Hanukkah menorah at the City-County Building, directing your attention to that one, and the one at the Yeshiva, or, indeed, at the Jewish Community Center, they are identical in appearance; are they not?

A. Yes.

Q. And indeed, they are identical except for the size of the one at the City-County Building; isn't that true?

A. Yes.

Q. And the one at the City-County Building is bigger than the one at the Yeshiva; isn't that correct?

A. That's correct.

Q. Now, with respect to the messages, the messages that you can recite are historical and cultural, and the other messages that you enumerate that are carried by the Hanukkah menorah, would you consider it a fulfillment of Rabbi Schneerson's directive to make public the Hanukkah menorah, would you consider it a fulfillment of that to place the Hanukkah menorah on the steps of the City-County Building at any other time of the year besides Hanukkah?

[79]

A. No.

Q. Indeed, on your declaration that was filed and is part of this case you say that Hanukkah is analogous to the 4th of July, which celebrates political freedom; isn't that correct?

A. Yes.

Q. But you wouldn't consider it carrying the message properly to place it there July 4th; would you?

A. Correct.

Q. And that's because it has to be done during the religious observance of Hanukkah; isn't that true?

A. No.

Q. Isn't it a fact that the timing of the Hanukkah season is what, in your opinion, gives the significance to the Hanukkah menorah?

A. Yes.

Q. Rabbi Rosenfeld, there is a commentary to the Code of Jewish Laws that you recognize known as the Lavuch; isn't that correct?

A. Correct.

Q. And isn't it correct that in the Lavuch we find a writing that says when you bless a Hanukkah menorah in a public gathering this is a great proclamation to God?

A. I don't think that that's the precise quote.

Q. What do you think is the precise quote?

A. I think what he mentions there is pertaining to lighting, [80] he talks about pertaining to lighting it in the synagogue, referring to that part of Shunara that we just spoke about earlier, as well as lighting it in one's home facing the outside.

Q. And when he speaks of lighting it in the synagogue, he refers to that as a public gathering; does he not?

A. I don't recall the exact wording. I'd have to take a look at it.

Q. Do you recognize the volume I have put before you as what we were talking about, the Lavuch?

A. Yes.

Q. Again, let me give you a photostatic copy with highlighting, because, of course, it is written in Hebrew; is it not?

A. Yes.

Q. And referring to the discussion that we have made reference to, doesn't it indicate that when you light within, that is, not outside of the street, not outside, there is no proclamation of the miracle, and therefore,

it's customary also to light in the synagogue; that is, outside the home, Rabbi?

A. That's correct.

Q. And to bless them, the Hanukkah menorahs, because this is a public proclamation in a public gathering; doesn't it say that?

A. Yes.

[81]

Q. And the note that I have highlighted there indicates, does it not, fair translation would be, would it not, because there is in this a great proclamation to God and His holy name when we place in a public gathering; is that a fair translation of what it says?

A. That's correct. What he's referring to is when lights in the synagogue, as he continues on, that the purpose of this is because there maybe guests there that have no home of their own, the synagogue then becomes their home, and it's then that, for that reason they make the blessing and light the menorah.

Q. And that is a great proclamation to God?

A. Yes.

Q. And as I understand, the differentiation you made here, and you explained when you were answering Mr. Saul's questions, the differentiation you made was between the menorah which one had in the home and the Hanukkah menorahs which one had outside the home; isn't that correct?

A. As far as one's obligation to light a menorah, that is correct.

THE COURT: Let's break for lunch, shall we.

MS. LITMAN: Okay, Your Honor.

THE COURT: See you at 1:30.

Is that all right?

(Court recessed at 12:26 o'clock p.m.)

* * *

[82]

(Court reconvened at 1:40 o'clock p.m.)

THE COURT: I guess the witness can take the stand again.

RABBI YISROEL ROSENFELD resumes the witness stand.

MS. LITMAN: If Your Honor please, plaintiff has marked the referred to exerpts from the book, "Let There Be Light", published, as the witness has testified, by the Lubavitch printer in 1986. Plaintiff has marked those exerpts to which reference has been made as Exhibit 18 and offers them in evidence.

MR. SAUL: No objection, Your Honor.

MR. SPECTER: No objection.

THE COURT: Okay. We'll receive them.

MS. LITMAN: If Your Honor please, I am giving a copy of this to the clerk, but it may be that we have a more clear copy which I'd like the opportunity to be able to forward to the Court and exchange, if I may.

THE COURT: No objection.

MR. SPECTER: Mrs. Litman, I just noticed that the date at the top of these exhibits was wrong. I think that should be the 22nd.

MS. LITMAN: Did counsel want to make a statement concerning the withdrawal from the record of an

assertion made in the course of an objection about the demonstration on the City-County Building steps? I was told that counsel wished to [83] withdraw his assertion concerning the sponsorship of the Soviet Jewry demonstration; is that correct?

THE COURT: I can't hear a thing you're saying.

MS. LITMAN: I'm sorry, Your Honor. I had been told that counsel wanted to withdraw from the record his assertion that the American Defamation League had sponsored some kind of exhibit. If I'm wrong—

MR. SAUL: It's my understanding that is was the parent organization of the Anti-Defamation League, the B'Nai B'Rith, that sponsored it. We didn't mean to imply the Anti-Defamation League itself sponsored the demonstration, if that suffices.

CROSS EXAMINATION (Continued)

BY MRS. LITMAN:

Q. Now, Rabbi, with respect to the messages, whatever you consider they are, that you feel need to be given or are given by the Hanukkah menorah, is it correct, according to you view, that they need to be, these messages need to be given during the observance of Hanukkah?

A. The messages need to be given at all times, but they are given through the menorah during Hanukkah.

Q. When you say the messages need to be given at all times, are you talking about the messages of celebration of the miracle that Hanukkah performs?

A. I'm talking—excuse me. I'm talking about the messages [84] of a little bit of light dispersing a lot of

darkness; the messages of the minorities being allowed to practice as they wish.

Q. What I am talking about is, as I understand it, you don't, you testified that you don't feel you would be carrying out the pronouncements and the desires of the Lubavitch Rebbe to put the Hanukkah menorah with these messages that you now refer to on the steps of the City-County Building on July 4th; that is correct, isn't is?

A. That's correct.

Q. And as I understand it, you don't feel that that would be carrying out the desires or the messages of the Lubavitch Rebbe because it's not Hanukkah at that time; is that right?

A. That is right.

Q. And isn't it correct that the reason you believe that these messages need to be given during the religious observance of Hanukkah is because it's then that they have meaning; isn't that correct?

A. The messages that have meaning more so when given through the menorah.

Q. Rabbi, you, you recall having your deposition taken in this case?

A. Yes.

Q. And that was just a couple of days ago; was it not?

A. That is correct.

[85]

Q. And at that time you were there with your counsel; were you not?

A. That's correct.

Q. And you were asked questions and gave answers; is that correct?

A. That's correct.

Q. And you answered those questions truthfully according to the best of your ability at that time; is that correct?

A. Correct.

Q. Now, let me direct your attention to Page 73 of the transcript of that deposition.

MR. SAUL: Mrs. Litman, do you have an extra copy of that?

MS. LITMAN: No, I don't. I'd like to put one before the witness, unless you want to come up here and stand at the witness.

Q. And referring you there to Line 4—let's start on Page 72.

Can you agree, without going through the question that we were beginning to get into, why it wouldn't be satisfactory say, to place the Hanukkah menorah on the steps of the City-County Building on July 4th?

A. Yes.

Q. And you were asked, Question, Line 21, "And why not". And the answer you gave then is, "It's not Hanukkah"; is that [86] correct?

A. That is correct.

Q. And then, Question, "And would you explain why that would make a difference?" Answer, starting on Line 25 and going to the next page, 73, Answer, "Because the messages that the, all the messages that

the menorah carries need to come along with what took place on Hanukkah."

Question, "And do they need to be done, do those messages—when you say 'need', do they need to be given during the religious observance of Hanukkah?" Answer, "Yes. It's then that they have meaning."

Question, "And is it that time that imparts, or helps impart their meaning?" Answer, "Yes."

Now, does the record state as I have read it?

A. Yes.

Q. And are those the questions you were asked and the answers that you gave at the time?

A. Yes.

Q. And are they true?

Q. Yes.

Q. Now, in response to the subpoena with which you were served, did you produce a pamphlet entitled, Hanukkah, a Lesson in Religious Freedom?

A. Yes.

Q. Let me just get the original.

[87]

I put before you a pamphlet with that title and ask you whether that pamphlet was published in the year 1985, again, by the Lubavitch printers.

A. Yes.

Q. And is that a photographic chronicle of public Hanukkah menorah celebrations which were sponsored by Chabad Lubavitch in the United States of America.

A. Yes.

Q. And does that contain, again, photographs of Hanukkah menorahs that were publicly displayed in the United States?

A. Yes.

Q. And sponsored by the Chabad Lubavitch group?

A. Correct.

Q. Incidentally, the menorah which is used here at the City-County Building and which is displayed, the one that you observed being lighted a year ago, is that the property of Chabad.

A. Yes.

Q. But you don't put it up each year; is that right?

A. Right.

Q. You don't take it down?

A. Right.

Q. The City does that; is that correct?

A. Yes.

Q. You don't store it?

[88]

A. Correct.

Q. The City does that; is that correct?

A. Correct.

THE COURT: As I understand it—let me see if I can get one fact established here. As I understand it, your organization furnished the menorah to the City and asked them to put it up and take it down and keep it at the City-

County Building, so that each year at Hanukkah time they can put it up and take it down?

THE WITNESS: I'm not sure of the exact, how it came about, whether it was our asking for them to store it or their suggestion that they will store it. But that's basically what takes place.

THE COURT: But your organization at least owns it and furnished it?

THE WITNESS: Yes.

THE COURT: All right.

Q. Now, Rabbi Rosenfeld, would you agree that the Torah is the embodiment of the Jewish religion as given to Moses by God?

A. Yes.

Q. And you have already testified that mitzvahs are the religious acts that Jews are directed to perform; is that correct?

A. That's correct.

[89]

Q. Directing your attention to the photographic chronicle, you see the page which refers to, which starts, Hanukkah, the Festival of Lights, and it has the Lubavitch Rebbe's photograph?

A. Yes.

Q. Just to clarify the record, there is only one Lubavitch Rebbe at any one time; isn't that right?

A. That's correct.

Q. And indeed, that position is something which is passed on from one Rebbe to another; is that correct?

A. Correct.

Q. Is it correct that in that pamphlet—and I'm referring now to the third paragraph—is states, quote, "The Hanukkah lights remind us in the most obvious way that illumination begins at home within one's self and one's family by increasing and intensifying the light of the Torah and mitzvahs in the everyday experience, even as the Hanukkah lights are kindled in growing number from day to day," and I've quoted it correctly so far; is that correct?

A. That's correct.

Q. And then is goes on to say, "but though it begins at home, it does not stop there." Do you agree with that?

A. That's correct.

Q. And is says—and this is from a letter written by the Lubavitch Rebbe; is that correct?

[90]

A. Yes.

Q. It states, "Such is the nature of light that when one kindles a light for one's own benefit, it benefits also all who are in the vicinity. Indeed, the Hanukkah lights are expressly meant to illuminate the outside, symbolically alluding to the duty to bring light also to those who for one reason or another still walk in darkness."

A. Correct.

Q. That is what the Lubavitch Rebbe says?

A. That is Correct.

Q. And you agree with that?

A. Correct.

Q. Incidentally, on the following page that I have clipped—do you see the page I have clipped.

Q. Yes.

Q. Reference is made to what you and I talked about before with respect to where Jews were commanded to mount their menorahs at the outset; isn't that correct?

A. Correct.

Q. And the reference there indicates that Jews were commanded to mount menorahs, it says there, on the outside of his home; is that correct?

A. That's correct.

Q. Along public streets; is that correct?

A. That's correct.

[91]

Q. And to publicize the miracle; is that what it says?

A. That is correct.

Q. Do you agree with that.

A. Referring to, if you explain, referring specifically to the menorah lit within the home, on the outside of it.

Q. And do you agree with that?

A. Yes.

Q. And the statement of what is accomplished by publicizing it?

A. That's correct. And if you like to continue, the messages that it carries just in the line further—or should I—

Q. On the next page, is it correct that in the Lubavitch publication of 1985, at the very bottom of the page,

the quotation is, "A little light dispels much darkness," and it goes on to say, "May the light of the Hanukkah menorah always illuminate the pathways to serving God for all people of good will." Do you see that; do you see "Miracle of the Lights"?

Do you have that before you now?

A. Yes.

Q. And the quotation that I just made—do you see that last paragraph?

A. Yes.

Q. Does that—that quotation does appear; does it not?

A. Yes, it does.

Q. Do you agree with that?

[92]

A. Yes, I do.

Q. Would you say that, "The hope that the light of the Hanukkah menorah would always illuminate the pathways to serving God," would you agree that that is a religious purpose?

A. It's a purpose of freedom of religion.

Q. Would you agree that that is a religious purpose?

A. If you're referring to any type of religion; not specifically one type of religion.

Q. Would you agree that illuminating the pathways to serving God is not a secular purpose?

A. Yes.

Q. You would agree that that is not for the purpose of advancing—it doesn't have a secular purpose to advance.

A. Correct. That particular message, that particular message I stated.

Q. Now, do you want to refer to the page that has Rabbi Menachem Schneerson's picture with it headed, "Hanukkah, 5747-1984." do you have that?

A. Yes.

Q. And is there a reference there to some excerpts that a talk, of a talk that the Lubavitch Rebbe gave to children, thousands of children gathered in the synagogue at his headquarters in Brooklyn; is there a reference there to that?

A. Yes.

[93]

Q. And at that time does it state that the Rebbe in that talk said to the children, "Hanukkah teaches us that our mission is to illuminate the darkness of the world with the brilliant light of Torah and mitzvot"; does it state that?

A. Yes.

Q. Do you agree that that is a correct statement?

A. Yes.

Q. And when the Rebbe was saying, "our mission", was he talking about the mission of Jews?

A. That's correct.

Q. And when the Rebbe was talking about, "illuminating the darkness of the world", that the Jewish mission, that the mission of Jews is to illuminate it with the

brilliant light of Torah; Torah is, again, what we've agreed, the embodiment of the Jewish religion; is that right?

A. That's right.

Q. And again, mitzvot are the religious acts that Jews are commanded to do; is that correct?

A. That's correct.

Q. Does the Lubavitch Rebbe dictate, or pronounce that Jewish people should eat only kosher food?

A. The Torah pronounces that.

Q. And does the Lubavitch Rebbe agree?

A. Definitely.

Q. And do you agree?

[94]

A. Yes.

Q. And you follow that, don't you?

A. Yes.

Q. And you, you recognize, don't you, that there are many Jews who do not follow that custom or pronouncement?

A. Yes.

Q. Indeed, under the Lubavitch belief and assertion of the law, is it correct, for example, that a Jewish woman should not have a uncovered head, except in certain limited places, but certainly not in public places?

MR. SAUL: Objection, Your Honor. I think, again, we're getting far afield from the actual issue in this case.

THE COURT: I tend to agree. Now, I have no objection to going on indefinitely, but—

MS. LITMAN: I'm almost finished.

THE COURT: —I don't understand the purpose of that. I understand what you're getting at here. You're seeking to have this witness concede that the menorah has some religious significance.

I don't think his testimony differs very much from the Rabbi, and I forget his name, that testified for the plaintiffs last December. So, I don't know that there's any purpose in going into all the various details, but we'll let you finish out.

MS. LITMAN: Let me—

[95]

Q. Well, let me just ask you that question.

According to your interpretation of what Jewish law directs, is it correct that Jewish women in circumstances in public are supposed to keep their head covered?

A. Yes.

Q. And would you concede that many Jewish women don't follow that law?

A. Correct.

Q. Indeed, the majority of Jewish women don't follow that law?

A. Correct.

Q. Now then, with respect to interpretations of Jewish law, would you concede that there are interpretations as to which you disagree with the interpretations of the reformed rabbis?

A. Correct.

Q. And would you concede that there are interpretations of Jewish law as to which you disagree with conservative rabbis?

A. Correct.

Q. Would you concede that one of the differences in interpretation of Jewish law may be as to the Hanukkah menorah?

A. It could be.

Q. And to the extent anything in your testimony today might be at variance with Rabbi Staitman's testimony earlier in this hearing at an earlier time, that would be an area in which you [96] and he would disagree; is that correct?

A. Might be so.

A. Although, as was mentioned, it might be that we agree somewhat here.

Q. Incidentally, Rabbi Rosenfeld, does the Chabad or the Lubavitch community reimburse the City for its erection or storage of the menorah?

A. I don't think so.

Q. Rabbi Rosenfeld, do you feel that by the intervention of Chabad in this case, and by your appearance here as a witness on their behalf, that you are helping to further the desires and beliefs of the Lubavitch Rebbe?

MR. SAUL: Objection. It's irrelevant to the issues here.

THE COURT: I think that's right. You've asked him does he feel that he's furthering the beliefs of the Lubavitch; is that your question?

MS. LITMAN: Of the Lubavitch Rebbe, the spiritual leader.

THE COURT: I guess he feels, I guess he feels that he is furthering that, since he's here testifying. So, I think it's obvious. But we'll let him answer it.

A. That's correct. But not limited to just that.

MS. LITMAN: I have nothing further.

THE COURT: Anything else?

[97]

MR. SAUL: I have some brief redirect, Your Honor.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. SAUL:

Q. Just to clarify, the views you've expressed with respect to the menorah, are those solely those of the Lubavitch movement?

A. No.

Q. And based upon your readings and your education, what other branches would have authorities within it which would convey the same messages?

A. Many parts of Judaism.

Q. What other branches of Judaism, in terms of reform, conservative, remainder of orthodox?

A. I have seen a similar message stipulated by other orthodox Rabbis, conservative rabbis as well as reformed Rabbis.

Q. And the views, what about the views, you were asked about some views concerning the Messiah; is that something that's solely Lubavitch concept?

A. Not—Hemonnes, as I mentioned before, mentions it as one of the 13 principles of faith.

Q. And that's an authority that reform, conservative and orthodox would all look to?

A. To my knowledge.

Q. You were asked about the Hanukkah menorah appearing in the [98] synagogue. Are you aware of the star of David?

A. Yes.

Q. Okay.

THE COURT: Aware of what?

MR. SAUL: The star of David.

Q. Does the star of David ever appear in synagogues, to your knowledge?

A. Yes.

Q. And is the star of David sometimes used for secular purposes?

A. Yes.

Q. Such as?

A. Logos, symbols, whatever they may be, whether—just any symbol—

Q. Okay.

A. —somebody might want to use it for.

Q. Mrs. Litman asked you about the blessings that were, that are said at an, either in the home or out in public. Are those, those blessings—to your knowledge, are those blessings always said in public places such as the City-County Building?

A. Not always.

Q. And how long do the blessings take when you do say the blessings?

A. Approximately 15 seconds, 20 seconds.

[99]

Q. And with respect to Chabad, is Chabad involved in what we would generally term solely, quote/unquote, "religious activities", or are there other secular type activities that Chabad is involved in?

A. There are others as well.

Q. Could you briefly describe?

A. Such as we have many drug rehabilitation programs on campuses throughout the country; that matter, throughout the world. In whatever way trying to, in addition to that, make the world a better place for human beings in whatever way possible.

Q. Okay.

Now, Mrs. Litman asked you about the references to lamplighters contained in the book that she asked you about. Does the reference to "lamplighter" apply solely with respect to menorahs?

A. No, not necessarily. As a matter of fact, that statement was made many, many years before public menorahs became the thing to do. It was mentioned as a general statement pertaining to what Chassid does, not specifically for what the menorah symbolizes.

Q. And with respect to your testimony during cross examination as to spreading the light of the Torah, which is sometimes called the five books of Moses, is the spreading of that light supposed to be only to Jews, of the ethical [100] principles within the Torah?

MS. LITMAN: Which is the question?

MR. SAUL: I'll rephrase that.

Q. Are there ethical principles mentioned in the Torah?

A. Yes.

Q. The five books?

And what obligation, if any, do you consider Jews have with respect to those ethical principles?

MS. LITMAN: If the Court please, that's objected to as improper redirect. When I cross examined the Rabbi I cross examined him with respect to spreading the light of the Torah. We did not—and he agreed that that was the embodiment of the Jewish religion. We have had no discussion with the ethical principles in the Torah, and therefore, this is improper redirect, and it's irrelevant.

THE COURT: I think it's unnecessary. It may be relevant and it may even be proper redirect, but it's not necessary, and obviously all serious people of whatever religion are interested in the ethical principles they teach being followed. That's one of the purposes of the teaching of all religion, is to try to maintain in the world some semblance of order and morality and good will, and there's no need to further philosophize.

Go ahead.

MR. SAUL: Let me rephrase my question, then, and I'll [101] try to move off the subject.

Q. With respect to the universal messages that the Judge just referred to, the conveying of those messages within Judaism, is that only to be conveyed, those messages only to be conveyed to Jews?

MS. LITMAN: That's the same objection.

THE COURT: It's unnecessary also, because I know that they want those messages conveyed to the world.

MR. SAUL: Okay.

Q. Then specifically with respect to the spreading the light of the Torah, could you describe what duties—what you meant by the spreading of the light of the Torah?

A. Is your question as far as to the world, or as far as to Jewish people?

Q. Let's take specifically with respect to the world.

A. As the Judge mentioned, the morality and ethical values that we all want spread to the world to make the world a better place to live in.

Q. Okay. Let me quickly direct you to a few passages within the pamphlet that the, Mrs. Litman asked you about, "Hanukkah, a Lesson in Religious Freedom."

MS. LITMAN: The pamphlet is not in evidence.

THE COURT: I have one here, "Let There be Light".

MR. SAUL: I'm sorry. The witness has the pamphlets in front of him.

[102]

Q. I would direct you to the bottom of the first page where it has the picture of the Lubavitch Rebbe. Where it says, "Indeed, the Hanukkah lights are

expressly meant to illuminate the 'outside', symbolically alluding to the duty to bring light also to those who, for one reason or another, still walk in darkness." Does that refer just to Jews, or to all people?

A. To all people.

Q. The bottom of the next page, where it says, "A little light dispels much darkness," quote/unquote. "May the light of the Hanukkah menorah always illuminate the pathways to serving God for all people of good will."

Does that refer—again, does that refer to just Jews, or all people?

MRS. LITMAN: If the Court please, I'd just like to clarify. If this witness is being asked what the intention was of the writer, I don't think that he's competent to give that. I think he can give his opinion as to what he thinks it means.

THE COURT: No, I think that most any religious leader could state what the intention of a religious writer was, especially if he's steeped in the tradition of the religion. But, of course, the real answer is that the written exhibit here speaks for itself.

MR. SAUL: Okay.

THE COURT: You must assume that the Court can read and draw reasonable inferences from what the article says.

[103]

MR. SAUL: I'll withdraw the question. At this point I would like to mark that exhibit for identification. It's actually marked as Deposition Exhibit 5 at this point.

MS. LITMAN: That one is mine. Why don't you mark yours. You have your copy.

I'll be glad to lend counsel mine, but he has another copy. So I'm just going to ask if he'll return mine.

MR. SAUL: We'll arrange something with counsel, but I would like that marked as Intervenor Exhibit Number 5.

THE COURT: What is it that you want to call 5?

MR. SAUL: The brochure that's entitled, "Hanukkah, A Lesson in Religious Freedom". And I would move for its introduction.

MS. LITMAN: Your Honor, I have no objection to it if it is limited solely to the purposes have impeachment as it was used, or for the purpose of showing what the pronouncements are of the Lubavitch Rebbe.

To the extent it may have any hearsay declarations of fact, as to those, I would object to it.

THE COURT: Well, we'll receive it.

MR. SAUL: I have no further questions, Your Honor.

MS. LITMAN: I just have a couple of questions, Your Honor. I'll be very brief.

RECROSS EXAMINATION

BY MRS. LITMAN:

[104]

Q. With respect to spreading the light of mitzvot, that as I understand you believe you should do, do you spread that to non-Jews?

A. Mitzvot that, the action of the mitzvah itself, no, but perhaps the lessons that they may carry, yes.

Q. With respect to the laws as to what should be carried out, isn't it a fact, Rabbi Rosenfeld, that under your belief they should be carried out by Jews only?

A. Carried out, correct.

Q. The brief blessing that counsel asked you about on redirect for the Hanukkah menorah, would you say it, please?

A. (Blessing was recited by witness in Hebrew.).

MS. LITMAN: Let the record reflect that the Rabbi said the blessing in Hebrew.

Q. We can ask you to say it, say it, transliterate a little bit more slowly for the reporter later, but would you please translate it into English, but more slowly.

A. We are blessing God who has sanctified us and commanded us with mitzvots and has told us to light the candles of Hanukkah.

MS. LITMAN: I have no further questions.

MR. SAUL: One clarification point.

REDIRECT EXAMINATION

BY MR. SAUL:

Q. The Ten Commandments that we've all heard of, are those [105] examples of the 613 mitzvahs?

A. Yes.

MR. SAUL: Nothing further.

THE COURT: All right. I guess we're through with you. You can relax and step down.

MR. SAUL: Your Honor, I had not intended to call any other witness, but to make a long story short, I'm

afraid I will have to call one more witness, in light of the cross examination of this past witness, and for some brief, brief testimony.

THE COURT: All right. I assume no objection.

MS. LITMAN: No, I have no objection, except that I wasn't prepared for it, so I hope it's very short.

MR. SAUL: Intervenor calls Rabbi Yisrole Miller.

YISROEL MILLER, having first duly affirmed, testified as follows:

DIRECT EXAMINATION

BY MR. SAUL:

MS. LITMAN: If Your Honor please, may counsel be requested to move the podium, because he's got it right between me and the witness.

THE COURT: Sure.

MS. LITMAN: Thank you.

Q. Could you please state your name and address for the record.

[106]

A. Yisroel Miller—M-i-l-l-e-r.

Q. And are you a Rabbi?

A. I'm an orthodox Rabbi.

Q. And do you have a pulpit?

A. I'm the Rabbi of congregation Poale—P-o-a-l-e—Zedeck—Z-e-d-e-c-k—in Squirrel Hill.

Q. And in Pittsburgh, Pennsylvania?

A. Yes.

Q. Okay. The Poale Zedeck Synagogue, is that reformed, conservative or orthodox?

A. That's orthodox.

Q. Is it Lubavitch?

A. No.

Q. And briefly, could you give us your educational background?

A. I attended seminaries—

MS. LITMAN: Your Honor, I will stipulate that this witness is a Rabbi ordained in the orthodox tradition.

MR. SAUL: So stipulated.

MS. LITMAN: I would like to say, Your Honor, that I want to point out that the Court agreed to open the record for the presentation of Rabbi Rosenfeld's testimony, and, of course, that has been done. The reason I am not prepared, and I have no idea what Rabbi Miller will be testifying to, is because it was represented to me by counsel that he wasn't [107] going to call him. He has told, he has represented to the Court that it's on matters drawn, covered by me in cross examination that necessitates it. So I would hope that it would be limited to that and I wouldn't be forced to object as having been outside the announced scope.

Q. Now, your synagogue, is it an Hassidic synagogue?

A. No.

Q. What about you yourself, are you a Lubavitch Rabbi?

A. No, I'm not.

Q. Are you an Hassidic Rabbi?

A. No, I'm not.

Q. What group, then, do you represent, if you could describe it?

A. I'm an orthodox Jew, standard brand, who decided to become a Rabbi, and I try to base my teachings on the consensus of rabbidic tradition without regard to any particular teacher.

Q. Okay.

THE COURT: If your standard brand is like the standard brands in most other religions, I suppose a lot of people would have trouble understanding what a standard brand was; is that right?

THE WITNESS: I suppose so.

THE COURT: Yes, All right.

Q. Just in like a sentence or two, describe for us in your opinion the religious observance of the Hanukkah lights.

[108]

A. The basic religious observance of Hanukkah lighting is to light a minimum of one candle each night of the holiday. It's also customary, and the Talmud says it is meritorious to light one candle the first night, two the second, three the third and so on, lighting eight candles the eighth night.

Q. Now, you mentioned candles, but not the menorah.

What's the significance of the Hanukkah menorah?

A. To the best of my knowledge, there is no significance to the Hanukkah menorah whatsoever. The Talmud mentions lighting candles, and commentators to the Code of Jewish Law, the Schulchan Aruch, say that it's perfectly proper to stick a candle on a counter top. This would be a Jewish home. You could put it, with

the Judge's permission, next to the lamp and just put them up without any kind of container whatsoever.

Q. And the mitzvah would be fulfilled by lighting it in such a manner?

A. The mitzvah would be fulfilled completely, yes.

Q. To your knowledge, is the menorah used by some Jews as a ethnic, non-religious symbol?

A. Jews are both a religion and a people. The word "people" is vague, but that's the way we're often represented. Today there's also a Jewish State of Israel. In a desire to represent the Jewish people the search for tangible symbols has led to the use of the star of David, which is on the logo of many Jewish organizations, and the state of the State of Israel [108] or the menorah, which is often both of those are used, although they have a basis in religious tradition, both are used extensively by secular Jewish organizations to represent the Jewish people.

Q. And how would you classify the Hanukkah candle lighting by most American Jews today?

A. No one has taken a survey of all the attitudes of American Jews towards Hanukkah. But I have found, and my work has been with Jews of all background and levels of observance and the lack of it.

MS. LITMAN: Excuse me, Rabbi, and I apologize for interrupting in the middle of your answer. But it has become apparent, Your Honor, that the question deals with what is, what individual Jews, or what Jews are doing with respect to lighting the menorah. That is not the question here.

The question with which the Court is faced is what is the effect of the government having a Hanukkah menorah

on the steps of the City-County Building, what is the effect; does—what is the message that it conveys to those who see it, and therefore, I would object to the scope of his testimony as being immaterial to the issues before Your Honor.

THE COURT: Well, I think he was about to say what most people that he has talked to consider to be the significance of lighting the Hanukkah menorah. I suppose the real objection to that is that he can't say what other people [110]
think—

MS. LITMAN: That's exactly correct, Your Honor.

THE COURT: —based upon what they have told him. But it's apparent, it's apparent that both of these witnesses have said that the Hanukkah menorah itself has no particular religious significance, depending on the circumstances. I think that's the point of the testimony. So, I think we'll sustain the objection to what his constituents have told him.

MR. SAUL: Okay. Just have a couple more quick questions.

Q. Is the menorah lighting at a public place, such as the City-County Building, an act mandated or encouraged by Jewish law or Jewish religious custom?

A. No.

MR. SAUL: I have no further questions.

MS. LITMAN: Just a couple of questions, Rabbi.

CROSS EXAMINATION

BY MRS. LITMAN:

Q. With respect to those Jews who follow the orthodox tradition, it is correct, is it not, that the majority of orthodox Jews are not Lubavitch?

A. That's correct.

Q. Indeed, the majority of orthodox Jews are not Hassidic, isn't that—

A. That's correct.

[111]

Q. With respect to you yourself, do you consider the Lubavitch Rebbe, Rebbe Menachem Schneerson, to be your religious leader?

A. I consider him a religious leader.

Q. Right.

A. I do not consider him my sole or central religious leader.

Q. Would you consider his opinions or directives or statements to be binding upon you?

A. No.

Q. When you testified about the Hanukkah menorah, you are not presuming, are you, to testify as to what impression the lighting of the Hanukkah menorah at the City-County Building, what impression it communicates to passers-by?

A. I don't recall being asked that question.

Q. No, but I am asking you, you are not testifying as to what impression it would communicate to those who pass by and see it; are you?

THE COURT: Well, he wouldn't know that.

MS. LITMAN: That's exactly right. That's the point I'm trying to make.

THE COURT: That's an unnecessary question, because he has no idea what impression passers-by get.

MRS. LITMAN: I have no further questions.

MR. SAUL: No more questions.

[112]

THE COURT: Are we through?

I guess you can step down.

MR. SAUL: Your Honor, at this point I have nothing further, except there was a document that's been marked as Deposition Exhibit 2, which is quoted in part in one of the exhibits that's been moved into evidence. That is the brochure, "Hanukkah, A Lesson in Religious Freedom", and I would merely move that the entire letter be seen so that the entire message can be seen in it's total context. And I would mark that letter, which was previously marked as Plaintiff's Deposition Exhibit Number 2 as Intervenor's Exhibit Number 6.

THE COURT: Well now, as I understand it, you made Exhibit 5 the pamphlet, "A Lesson in Religious Freedom"?

MR. SAUL: Correct.

THE COURT: Why—is the letter attached to Exhibit 5?

MR. SAUL: The letter is quoted from, and the witness was, Rabbi Rosenfeld was asked about that excerpt and—

THE COURT: You mean the excerpts from the article?

MR. SAUL: From the letter. Excuse me.

THE COURT: Let me see the letter.

MS. LITMAN: Your Honor, I would like to point out to the Court that this letter is not authenticated. It has not been referred to. I mean, the fact that it's quoted, a piece of it is quoted in the pamphlet is meaningless. I don't think [113]
the letter even—

THE COURT: Wait till I understand. Is the letter quoted in the pamphlet?

MR. SAUL: Yes. And the witness was asked about that. That's, I believe, the same letter.

MS. LITMAN: I object to it's authenticity. I object that it is not the letter in it's entirety. And I object to it as hearsay.

THE COURT: Well now, you don't object to Exhibit 5, as I understand it?

MS. LITMAN: No sir.

THE COURT: And in Exhibit 5 there's a letter referred to, and part of it is contained in the Exhibit, but not all of it. Let me look at the exhibits and read them.

MS. LITMAN: We have no way to know whether it's referring to that same letter, Your Honor. There is no such testimony.

THE COURT: I think the pamphlet quotes the letter verbatim except the last two paragraphs.

MR. SAUL: That's correct, Your Honor.

THE COURT: And the last two paragraphs merely refer to United States, states that what is true of the individual is true of the nation, and it is the duty and privilege

of the nation to promote the forces of light for both home and abroad and steady the growing measure, and let us pray that the [114] message of Hanukkah lights will illuminate the everyday life of everyone personally and society at large.

I see nothing omitted in the pamphlet except the last two paragraphs, which don't add or detract anything. So, I think we'll just omit the letter and, for practical purposes more than anything else, and not bother making it a separate exhibit.

MR. SAUL: Very well, Your Honor.

MS. LITMAN: If Your Honor please, I would like to offer in evidence, there is a survey of Greater, of Greater Pittsburgh Jewish population dated 1984 which was prepared by the Jewish Community Federation, and it was a survey as to the Jewish population. Counsel has stipulated as to it's authenticity, and rather than offer the whole thing, I would ask the Court if it would accept from that, and perhaps counsel will stipulate that with respect to the number of Jews in Pittsburgh it indicates that there are 44,906 as of that time. And with respect to the number of persons of all ages who follow the orthodox tradition, there are 12.6 percent.

MR. SPECTER: The Court please, with all due deference to Mrs. Litman, I have not been consulted previously and I have not stipulated to the authenticity of it, and I object to it as pure hearsay at this time.

MS. LITMAN: Then we will offer it solely with respect to the intervenor, Your Honor, and ask that it be entered for [115] consideration as to that.

MR. SPECTER: I renew my objection because just because one counsel agrees to it it is not admissible.

MR. SAUL: Intervenor's position is, I told Ms. Litman we would stipulate to the authenticity of the document, but we believe it's totally irrelevant and would object to it's introduction. We're not involved in a numbers game here, and why are we—what is served by the recitation of the Jewish population solely of the City of Pittsburgh and the percentage of orthodox within the City of Pittsburgh. I mean, this is a national issue, there are Jews elsewhere in the United States, in the world, and how many Jews there are solely in the City of Pittsburgh and their make up is totally irrelevant.

MS. LITMAN: Your Honor, there, of course, lies one of the major differences in what intervenor believes to be the issue, because it, of course, is, with respect to the menorah, has the City of Pittsburgh violated the United States constitution by communicating a message that is not primarily secular, and therefore, the City of Pittsburgh is the only place that is relevant. The reason the make up of the Jewish population—of course, it's in by the witness already—but the reason for the submission of—

THE COURT: Let's get back to Rules of Evidence. I can't accept the survey here that's objected to if the author isn't here so that he can be cross examined as to his methods [116] in preparing the survey. So, strictly on the basis of the Rules of Evidence, since there's an objection I can't receive it. But, of course, the Rabbi who testified gave us the number of Jewish people in Pittsburgh. I don't know whether he gave us the percentage that were orthodox or not, or whether that really means anything. Of course, parenthetically, I'm not sure that any of this means anything to me in deciding the case. So, we'll not receive the survey. But we'll, of course, consider what the Rabbi said about population.

MS. LITMAN: Thank you, Your Honor. I have nothing further.

THE COURT: Now, let me ask you to state you posture here. As I recall it, on December 22nd, after hearing evidence, I merely refused to issue an injunction. And then I was told that there would be no necessity for another hearing because the plaintiffs and the defendants had stipulated there would be no additional facts, and the record should be closed so that the plaintiffs could take an appeal.

As I recall, during the hearing of December 22nd of 1986 the Chabad did petition to intervene, and I denied it on the basis of the plaintiff's objection, since the hearing was underway, but I did say before we closed the record that they could intervene for the purpose of introducing some testimony which we've heard today.

Now, as I understand it, the record should be closed. [117]
Obviously, there's no necessity for a permanent injunction, I suppose, at this time because the displays are no longer in existence. Since the holiday season has expired, the displays have been taken down. So, as I say there would be no necessity for a permanent injunction, unless it's requested that there be an injunction prospectively looking toward the next holiday season.

Of course, we don't know what those displays would consist of or what the law will be by the time we get to the next holiday season.

So, as I understand the posture you're in now, the record's closed, and you're in position to take an appeal; is that right?

MS. LITMAN: Well, Your Honor, the record is closed, but let me, and I believe when the Court issues an order we are in a position to take an appeal, but let me remind Your Honor that the plaintiffs requested in their request for relief a permanent injunction prohibiting the defendants from expending public resources—I'm reading

from the complaint, for the display of a creche and/or menorah and from storing, erecting, maintaining and displaying a creche and/or menorah on or in the Allegheny County Courthouse and City-County Building, and that the plaintiffs further requested a declaratory judgment, as is recited in Paragraph 1, which I don't have to enumerate, but it deals with our request that the Court declare the expenditure [118] of public finds and so forth in this case violates the First and Fourteenth Amendments.

So the request was for a preliminary injunction at that time, but also for a permanent injunction as well.

So, the record is closed, Your Honor, but I believe that the Court has to either make its previous order final or issue a final order granting or denying the permanent injunction and declaratory relief in order that we can then perfect an appeal.

THE COURT: I think you're right. I'll have to make some definitive order with respect to the request for permanent injunction and declaratory relief.

All right. Is there anything anybody else has to say?

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IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,

Plaintiffs

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,

Defendants

Civil Action No. 86-2617

CHABAD,

Intervenor

MOTION TO CORRECT TRANSCRIPT

Intervenor Chabad and Appellants American Civil Liberties Union, Greater Pittsburgh Chapter, Ellen Doyle, Michael Antol, Reverend Wendy L. Colby, Hilary Spatz Levine and Max A. Levine hereby jointly request that the transcript in the above-captioned case by corrected as follows:

HEARING DATE OF DECEMBER 15, 1986

Page	Line	From	To
86	22	Hebrewan	Hewbrew Union

Page	Line	From	To
90	2	Mitzvots	Mitzvot
91	19	Manomonetis	Maimonides (delete or my)
95	17	review	the view

HEARING DATE OF APRIL 24, 1987

Page	Line	From	To
8	21	scene	sign
8	22	scene	sign
19	3	Borobeck	Boro Park
26	18	Massusad	Mezuzah
28	18	one	can be
36	5	nain	nun
36	6	nain stands	nun stands
36	6	nain means	nes means
39	8	antecedent	antithesis
39	15	consciousness	conscience
40	11	Halahau	Halacha
41	15	Rebbe	Rabbi
42	23	Rebbe	Rabbi
44	24	of	have
47	10	Rebbes	Rabbis
51	8	Hemonnes	Maimonides
55	12	Vann	Bonn
67	11	take	that
67	19	Rebbi	Rabbi
68	3	Rebbe	Rabbi
69	1	rebra	bracha
73	22	Rabbi	Rebbe
74	4	Rabbi	Rebbe
74	6	Rabbi	Rebbe (2 times)
97	20	Not—Hemonnes,	No. Maimonides,
107	16	rabbidic	rabbinic
113	25	and steady the growing measure	in a steadily growing measure

Counsel for all other parties have been contacted and have authorized the undersigned to state that they have no objection to this Motion.

Dated at Pittsburgh, Pennnsylvania, this 21st day of September 1987.

./s/.....
Counsel for Chabad

./s/.....
Counsel for American Civil Liberties Union, Greater Pittsburgh Chapter, Ellen Doyle, Michael Antol, Reverend Wendy L. Colby, Hilary Spatz Levine and Max A. Levine

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,

Plaintiffs

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania,

Defendants

Civil Action No. 86-2617

CHABAD,

Intervenor

ORDER GRANTING MOTION TO CORRECT TRANSCRIPT

IT IS HEREBY ORDERED that the Motion to Correct Transcript, dated September 21, 1987, is granted.

Dated at Pittsburgh, Pennsylvania, this 21st day of September, 1987.

/s/.....
United States District Judge